Comments

TAXATION DIRECTED AGAINST THE CHAIN STORE

INDEPENDENT merchants have sought for many years to hamper the development of chain stores and by burdening them with taxes and regulations to offset the competitive advantage the latter have acquired through their more efficient methods of retailing and distribution. Resultant legislation of the sort typified by the police regulation of chain drug stores in Pennsylvania,[1] and the prohibition of chain systems in Maryland as monopolies,[2] proved too severe to be successful. Accordingly the anti-chain interests have recently been resorting to taxation as an alternative impediment. During the past two years more than eighty bills designed to place heavier tax burdens upon chain systems than upon independent retail merchants have been introduced into the legislatures of twenty-nine states.[3] While only seven such measures have thus far become laws, it is safe to predict that when the legislatures of forty-four states convene this coming year, other such statutes will be enacted.[4]

The License Tax

The so-called "chain store license tax," the first device attempted, was adopted by four states—Georgia,[5] Indiana,[6] North Carolina[7] and South Carolina.[8] The *Quaker Maid* case[9] in Kentucky in 1926 was really a forerunner to the litigation that has arisen over this type of tax. The city of Danville, in a thinly-veiled effort to discriminate against chain stores, had passed an ordinance imposing a $12 license tax on each ordinary retail grocery store but exacting a fee of $50 from stores extending no credit and providing no delivery. The Supreme Court of Ken-

[1] Liggett v. Baldridge, 278 U. S. 105, 49 Sup. Ct. 57 (1928).

[2] Keystone Grocery Co. v. Huster, (Allegheny County Court, Md., Equity Case No. 10922, 1927, unreported).

[3] ANNUAL REPORT OF THE NATIONAL CHAIN STORE ASSOCIATION (Oct. 1, 1930) 16-22.

[4] W. N. Taft, *Result of Chain Baiting* (Nov. 1930) CHAIN STORE AGE 30.

[5] GA. CODE (Supp. 1930) § 993 (280).

[6] Ind. Acts 1930, c. 207.

[7] N. C. Acts 1927, c. 80, § 162.

[8] S. C. Acts 1930, No. 829.

[9] City of Danville v. Quaker Maid Co., 211 Ky. 677, 278 S. W. 98 (1926). *Cf.* City of Covington v. Dalheim, 126 Ky. 26, 102 S. W. 829 (1907) (tax on grocers using delivery wagons held invalid because discriminatory).

tucky granted an injunction against the collection of this tax on the ground that there was no sufficient difference between the two types of stores designated in the ordinance to justify the classification. In 1928 the first tax case expressly involving chain stores came up under a North Carolina statute [10] providing for the collection of a license tax of $50 from each retail store operated by any person or organization maintaining six or more stores in the state. This statute was held invalid in *Great Atlantic & Pacific Tea Co. v. Doughton* [11] on the ground that large scale methods of buying and selling, seen as the sole distinguishing characteristic of the chain store, did not sufficiently differentiate it from the store of the individual merchant to warrant separate classification. The following year the same result was reached by a United States District Court in a well-considered opinion in the case of *Jackson v. Board of Tax Commissioners* [12] which involved the license tax in Indiana,[13] graduated from $3 on the first store to $25 on each store, in excess of twenty, operated by the same concern. North Carolina meanwhile had changed its statute to impose a tax of $50 on each store, in excess of one, operated by the same individual or corporation.[14] And in *Great Atlantic & Pacific Tea Company v. Maxwell*,[15] the Supreme Court of that state, by an unexpected reversal of front, upheld the statute. The Court distinguished its previous decision in the *Doughton* case on the basis that the tax there declared invalid had not been levied on chain stores *per se*, and asserted without further explanation that there exists a real and substantial difference between the operation of chains and independent stores. Both this and the Indiana case are now pending before the Supreme Court of the United States.

There is little doubt that this type of license tax will be condemned by the Supreme Court as unconstitutional.[16] According to the principle which it has frequently reiterated in considering license taxes, there must be between the classes created by the tax statute a "real and substantial difference," bearing "a reasonable relation to the subject of the legislation," in order to

[10] *Supra* note 7.

[11] 196 N. C. 145, 144 S. E. 701 (1928).

[12] 38 F. (2d) 652 (D. Ind. 1930).

[13] See *supra* note 6.

[14] N. C. Acts 1929, c. 345, § 162. The possibilities of this type of statute are illustrated by the recent declaration of the Attorney General of North Carolina that public utility corporations which sell gas and electric appliances at their places of business are retailers within the scope of this statute. U. S. Daily, Dec. 15, 1930, at 3142.

[15] 154 S. E. 838 (N. C. 1930).

[16] *Cf.* Becker and Hess, *Chain Store License Tax and the 14th Amendment* (1929) 7 N. C. L. REV. 113, 120; (1928) Note 77 U. OF PA. L. REV. 426; Strawn, *Baiting the Chain Store*, (Nov. 1930) CHAIN STORE AGE 27, 28.

qualify the classification under the "equal protection" clause of the Fourteenth Amendment.[17] Inasmuch as both chains and independent merchants carry much the same stock of goods, and distribute to the public in much the same manner, it may well be argued that they differ only in respect to ownership and method of operation. This difference, it has been asserted, is not sufficient to meet the requirements of a valid classification.[18] Moreover, the Supreme Court has given weight to this contention, as far as the factor of ownership is concerned, by its decision in the *Quaker City Cab Co.* case,[19] where a gross receipts tax was held invalid because it discriminated against corporate proprietors of taxicabs. The distinction made in that statute, however, was predicated solely upon the legal personality of the owner as a corporation or as an individual.[20] Moreover, since a classification based strictly on the amount of business transacted may be deemed reasonable,[21] a distinction dependent on form of organization might be recognized were such form an accurate index of the volume of trade.[22] Fundamental differences in character of business have also been recognized by the Supreme Court as a valid ground for classification. Thus wholesale and retail dealers have frequently been distinguished for this purpose,[23]

[17] See Southern Ry. v. Greene, 216 U. S. 400, 417, 30 Sup. Ct. 287, 291 (1909); Crescent Oil Co. v. Mississippi, 257 U. S. 129, 137, 42 Sup. Ct. 42, 44 (1921); Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 37, 48 Sup. Ct. 423, 425 (1928).

[18] Strawn, *op. cit. supra* note 16, at 28. See also Note (1928) 77 U. OF PA. L. REV. 426, 427.

[19] Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 48 Sup. Ct. 553 (1928).

[20] *Cf.* Note (1928) 28 COL. L. REV. 972; Note (1928) 27 MICH. L. REV. 800.

[21] See Citizens Telephone Co. v. Fuller, 229 U. S. 322, 328, 33 Sup. Ct. 833, 834 (1913).

[22] *Cf.* Note (1928) 27 MICH. L. REV. 800, 802. Where the Supreme Court has found that there is usually an important difference in the degree of business transacted by corporations as compared with that done by individuals, it has upheld such a classification. Flint v. Stone-Tracy Co., 220 U. S. 107, 158, 31 Sup. Ct. 343, 353 (1910) (corporate income tax upheld); Amoskeag Savings Bank v. Purdy, 231 U. S. 373, 393, 34 Sup. Ct. 114, 118 (1913) (state tax on national bank stock upheld despite denial of deduction for debts which was allowed to individual bankers); *cf.* Miller v. Wilson, 236 U. S. 373, 384, 35 Sup. Ct. 342, 344 (1914) (statute limiting the hours of work for women in hotel upheld though no such restriction was placed on boarding houses operated by individuals). In the Quaker City Cab Co. case, *supra* note 19, it is not clear to what extent this consideration was involved. The Court said "The discrimination here is not justified by any difference in the source of the receipts or in the situation or character of the property employed." 277 U. S. at 402, 48 Sup. Ct. at 555. But *cf.* the dissent of Mr. Justice Holmes in the same case. 277 U. S. at 403, 48 Sup. Ct. at 555.

[23] Southwestern Oil Co. v. Texas, 217 U. S. 114, 30 Sup. Ct. 496 (1910); American Harrow Co. v. Shaffer, 68 Fed. 750 (D. Va. 1895); Daniels v.

and a state legislature was recently permitted to treat cooperative marketing associations as a separate class.[24] Similarly, in at least two instances, the Supreme Court has upheld for tax purposes a classification based upon the difference between two methods of carrying on the same business.[25] It is hence to be expected that arguments for the validity of chain store license taxes will stress not only an essential variance in amount of business transacted but also a characteristically unique quality in the business itself.

The peculiar weakness of the license tax device, as it has thus far been employed, lies in the obviousness of its intention to discriminate against chain stores.[26] It was because their arbitrary purpose was similarly apparent that the somewhat analogous taxes levied against department stores over three decades ago were held invalid.[27] In this connection, the question of the extent to which a state will be permitted to carry out an avowedly domestic policy by means of taxation arises as a consideration affecting the validity of the tax. In the *Doughton* case the court emphasized the fact that no question of state policy with refer-

State, 150 Ind. 348, 50 N. E. 74 (1898); Kniseley v. Cotteral, 196 Pa. 614, 46 Atl. 861 (1900); Mefford v. City Council, 148 Ala. 539, 41 So. 970 (1906).

[24] Liberty Warehouse Co. v. Burley Tobacco Growers Co-op. Marketing Ass'n, 276 U. S. 71, 48 Sup. Ct. 291 (1928).

[25] Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup. Ct. 192 (1912) (statute imposing license tax on hand laundries while exempting steam laundries held not to deny equal protection); Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 34 Sup. Ct. 493 (1914) (tax on business of selling and delivering sewing machines held not to constitute an unlawful discrimination when merchants selling machines at their regular place of business exempt). *Cf.* also Brown-Forman Co. v. Kentucky, 217 U. S. 563, 30 Sup. Ct. 578 (1909) (tax imposed on resident rectifiers of liquor held not unreasonable because not exacted from non-resident rectifiers); Fort Smith Lumber Co. v. Arkansas, 251 U. S. 532, 40 Sup. Ct. 304 (1919) (statute upheld which taxed corporations for stock owned in other corporations while exempting unincorporated stockholders); Heisler v. Thomas-Colliery Co., 260 U. S. 245, 43 Sup. Ct. 83 (1922) (tax on anthracite coal upheld though not levied on bituminous coal).

Classifications have also been upheld when based on the size or population of different localities, merchants in different places paying different amounts. Adam Motor Car Co. v. Cler, 149 Ga. 818, 102 S. E. 440 (1920) (motor car dealers); Dallas Gas Co. v. State, 261 S. W. 1063 (Tex. Civ. App. 1924) (public utility corporations). In Tennessee the proposed sales tax on grocery stores was graduated according to the population of the county where a store was located. See ANNUAL REPORT OF THE NATIONAL CHAIN STORE ASSOCIATION (Oct. 1, 1930) 20.

[26] See Heisler v. Thomas Colliery, *supra* note 25, at 255, 43 Sup. Ct. at 84; Bell's Gap R.R. v. Pennsylvania, 134 U. S. 232, 237, 10 Sup. Ct. 533, 535 (1889); Power Co. v. Saunders, 274 U. S. 490, 493, 47 Sup Ct. 678, 679 (1926).

[27] State v. Ashbrook, 154 Mo. 375, 55 S. W. 627 (1900). *Cf.* City of Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707 (1899) (police regulation aimed at department stores held unduly discriminatory).

ence to chain stores was brought up at the trial.[28] In the *Jackson* case considerable stress was laid on this aspect of the case by both counsel, and the court found that while chain store operators often do not have the general interest of the community at heart and hence are not always as valuable to it as stores owned by single proprietors, this condition was not sufficiently universal to sustain their different classification for occupational tax purposes.[29] Yet in the *Maxwell* case the North Carolina court came to quite the opposite conclusion.[30] The United States Supreme Court formerly took the position that a state taxation policy will warrant a particular classification giving effect to that policy.[31] Accordingly the Court sustained taxes imposed on occupations which the state in question regarded with disfavor.[32] Recently, some doubt has been cast on this proposition by the decision of the Court in *Liggett v. Baldridge*,[33] which, although not involving a revenue measure, held invalid an act purporting to be a police regulation but obviously intended to prevent the further extension of chain drug stores. It is significant, furthermore, that whereas this attitude of non-interference with state policies once found expression in the majority opinions of the Court,[34] it is now stated in the dissents.[35] It may consequently be doubted whether a presentation of the policy argument before

[28] *Supra* note 11, at 152, 144 S. E. at 705.

[29] *Supra* note 12, at 658.

[30] *Supra* note 15, at 843. But *cf*: "It is not shown that the interest of the public, as distinguished from a particular class, requires chain stores to be regulated . . . . the evidence does not show that the public have been damaged by chain stores or their methods of operation." Keystone Grocery & Tea Co. v. Huster, *supra* note 2 (statute prohibiting any one individual or firm to operate more than five stores in the county was held invalid).

[31] *Cf.* Note (1928) 27 MICH. L. REV. 800, 802.

[32] "A state does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry." Holmes, J., in Quong Wing v. Kirkendall, *supra* note 25, at 62, 32 Sup. Ct. at 193. *Cf.* American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 95, 21 Sup. Ct. 43, 46 (1900), where the Supreme Court upheld a tax on manufacturers engaged in refining, which exempted farmers who refined on plantations, for the reason that the discrimination was obviously intended as an encouragement to agriculture.

[33] *Supra* note 1.

[34] The most persistent advocate of non-interference has been Mr. Justice Holmes. See Quong Wing v. Kirkendall, *supra* note 25, at 62, 32 Sup. Ct. at 193; Central Lumber Co. v. South Dakota, 226 U. S. 157, 160, 33 Sup. Ct. 66, 67 (1912).

[35] "I did not suppose it to have been denied that taxing acts like other rules of law may be determined by differences of degree and that to some extent states may have a domestic policy that they constitutionally may enforce." Holmes, J., dissenting in the Quaker City Cab Co. case, *supra note* 19, at 403, 48 Sup. Ct. at 555. See also Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 41, 48 Sup. Ct. 423, 426 (1928).

the Court in support of the license tax would prove in any degree efficacious.[36]

The argument might conceivably be advanced that license tax statutes discriminating against chain systems are designed to protect competition and to prevent monopolies.[37] The wording of the Georgia statute [38] gives some force to this contention, and the Supreme Court has on several occasions used language which justifies the assumption that such an argument might prove effective.[39] The Mississippi court, in a recent case,[40] adopted precisely this reasoning when it upheld a statute regulating prices to be charged by chain operators of cotton gins on the ground that the statutory purpose to prevent unfair competition justified the classification. Moreover judicial recognition has been accorded the fact that the growth of chain systems has resulted locally in monopolistic practices and the lessening of competition.[41] But even granting the existence of such conditions, it may be doubted whether a relation could be shown between

[36] The change in personnel of the Court since the Liggett decision must, however, be recognized as a factor to be considered, since only four of the present members of the Court voted with the majority in the Liggett case. That Mr. Chief Justice Hughes, in his previous term on the Court, concurred in the then majority opinions of Mr. Justice Holmes on the point, may possibly be considered evidence that he will now line up with Justices Holmes, Brandeis, and Stone, who dissented from the Liggett decision, in support of non-interference with state taxation policies. On the other hand, Mr. Justice Roberts may be in sympathy with the views he advanced as counsel for the Liggett Company, and also for the Quaker City Cab Company in its analogous protest against a Pennsylvania statute.

[37] See Becker and Hess, *op. cit. supra* note 16, at 128.

[38] "Under the police powers of this state, the business of conducting chain stores . . . hereby is classified as a business tending to foster monopolies and there is hereby levied on each person, firm, or corporation owing, operating, maintaining, or controlling a chain of stores consisting of more than five stores, the sum of $50 for each store. . . ." GA. CODE (Supp. 1930) § 993 (280).

[39] ". . . the law assailed was enacted by the State in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly with its attendant evils. It is clearly settled that any classification adopted by a State in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the laws clause of the Fourteenth Amendment. . . ." Clarke, J., in Crescent Oil Co. v. Mississippi, *supra* note 17, at 137, 42 Sup. Ct. at 44 (cotton seed oil manufacturers not allowed to own or operate cotton gins). See State v. Central Lumber Co., 226 U. S. 157, 161, 33 Sup. Ct. 66, 67 (1912) (lumber dealers selling at more than one place required to set one price).

[40] State v. Gilmer Grocery Co., 125 So. 710 (Miss. 1930).

[41] See United States v. Southern California Wholesale Grocer's Ass'n, 7 F. (2d) 944, 948 (D. Cal. 1925).

them and the possible effect of a state-wide license tax, sufficient to justify the discriminatory character of the tax. Only once has a court passed upon the validity of the monopoly theory as a basis for state regulation of chain stores, and there the statute was held unconstitutional.[42]

The Sales Tax

In 1929 the state of Georgia adopted a gross sales tax on all commodities, to be computed as a flat percentage of gross receipts after an exemption of $30,000.[43] The anti-chain nature of this legislation becomes apparent from the fact that a chain of stores is deemed one business so that but one exemption is permitted for the entire chain. Even more obviously discriminatory is the sales tax recently enacted in Mississippi,[44] whereby all persons or companies operating more than five stores in the state are compelled to pay double rates on their gross sales. In Kentucky the persistency of the anti-chain sentiment was emphasized by the shift in legislative program immediately after the decision in the *Jackson* case [45] had warned against obvious efforts to discriminate against chain stores. Abandoning its proposed flat percentage tax on sales over an exempted minimum, the Kentucky legislature adopted instead a sales tax imposing a sliding scale of levies in direct ratio to the volume of annual sales,[46] thus substituting for one method of burdening the chain store another even more effective if less apparent. Cases involving the constitutionality of each of these three statutes are now pending.

As sales taxes have not been numerous in this country there are few cases involving their validity.[47] That a state may tax merchants on the basis of their sales has, however, never been questioned;[48] indeed courts are inclined to favor such a tax as

[42] Keystone Grocery & Tea Co. v. Huster, *supra* note 2: ". . . and even if the welfare of the public demanded some form of regulation, this act wholly fails to provide any regulation at all." The statute made it unlawful for anyone to own or operate more than five mercantile stores in one county.

[43] GA. CODE (Supp. 1930) § 993 (323). Georgia now has a license tax and a gross sales tax, both of which discriminate against chain stores.

[44] Miss. Stat. 1930, No. 567, c. 9, art. 1, § 2.

[45] *Supra* note 12.

[46] KY. STAT. (1930) § 4202a 1-12.

[47] Isaacs, *Business and Property Taxes* (1926) 36 YALE L. J. 195. See 4 COOLEY, TAXATION (4th ed. 1924) § 1673. For a discussion of the problem raised by the "original package" doctrine in connection with a sales tax on wholesale gasoline dealers, see Sonneborn v. Cureton, 262 U. S. 506, 43 Sup. Ct. 643 (1923).

[48] Schuster v. City of Louisville, 124 Ky. 189, 89 S. W. 689 (1905); In re Opinion of the Justices, 149 Atl. 321, 330 (N. H. 1930); COOLEY, *op. cit. supra* note 47, at § 1706.

based on the amount of business transacted.[49] Furthermore a state is privileged to single out any one commodity or class of commodities as the object of taxation because the *ad valorem* and uniformity clauses of state constitutions do not apply to excise taxes.[50] At present five states impose small taxes on the gross sales of all retail mercantile establishments [51] and a proposal for a similar tax has recently received judicial approval in a sixth state.[52] But none of these taxes, all of which operate on a flat rate and without exemptions, is in any sense discriminatory. In a few other instances, taxes of a more local character, imposed on the sales of all kinds of goods, wares and merchandise have been before the courts.[53] Yet in spite of the fact that some of these taxes were graduated according to volume of sales, the discrimination issue has never been seriously considered.[54]

Certain familiar types of sales tax on specific commodities have recently proven successful. The most important of these, the gasoline sales tax, was first adopted in 1919 in Colorado, Oregon and South Dakota, and has now been imposed in practically every state.[55] This tax has been levied in various forms, all of which have been held constitutional,[56] and it has come to be an important factor in producing state revenue.[57] Sales or

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[49] See Hager v. Walker, 128 Ky. 1, 18, 107 S. W. 254, 259 (1908); San Luis Obispo County v. Greenberg, 120 Cal. 300, 304, 52 Pac. 797, 798 (1898); Comment (1924) 33 YALE L. J. 321; COOLEY, *op. cit. supra* note 47, at § 354.

[50] Adams Motor Car Co. v. Cler, *supra* note 25; Gafill v. Bracken, 195 Ind. 551, 145 N. E. 312 (1924); COOLEY, *op. cit. supra* note 47, at §§ 269, 348.

[51] CONN. GEN. STAT. (1930) c. 75, §§ 1340-1351; DEL. REV. CODE (1915) § 198; W. VA. CODE ANN. (Barnes, 1923) c. 31A; PA. STAT. (West, 1920) § 14727; MO. REV. STAT. (1919) § 13065ff.

[52] In re Opinion of the Justices, *supra* note 48.

[53] Joseph v. Milledgeville, 97 Ga. 513, 25 S. E. 323 (1895); Wayne Mercantile Co. v. Comm'rs, 161 N. C. 121, 76 S. E. 690 (1912); San Luis Obispo County v. Greenberg, *supra* note 49.

[54] *Cf.* Clark v. Titusville, 184 U. S. 329, 22 Sup. Ct. 382 (1902). In one instance the issue was even raised as an ingenious objection to a non-graduated tax. See Patton v. Brady, 184 U. S. 608, 618, 22 Sup. Ct. 493, 497 (1902).

[55] Wham, *The Gasoline Tax* (1927) 21 ILL. L. REV. 771; (1926) 1 IND. L. J. 53.

[56] Altitude Oil Co. v. People, 70 Colo. 452, 202 Pac. 180 (1920) (flat rate); Bowman v. Continental Oil Co., 256 U. S. 642, 41 Sup. Ct. 606 (1921) (flat rate); Texas Co. v. Brown, 258 U. S. 466, 42 Sup. Ct. 375 (1922) (graduated rate); Pierce Oil v. Hopkins, 264 U. S. 137, 44 Sup. Ct. 251 (1924) (flat rate); Gafill v. Bracken, *supra* note 50 (flat rate); *cf.* Ohio Oil Co. v. Conway, 281 U. S. 146, 50 Sup. Ct. 311 (1930) (graduated severance tax).

[57] "Last year the gasoline sales tax collected in the United States was in excess of $431,000,000—a pretty good collection from a standing start precisely ten years before." W. N. Taft, *op. cit. supra* note 4, at 32.

"stamp" taxes on distilled liquors,[58] tobacco,[59] and theatre tickets [60] are also quite common. Yet that the term "sales tax" has been indiscriminately applied to assessments measured by a proportion of gross income and to taxes upon the unit sale of a specific article in no sense authorizes a common grouping, for the purpose of determining constitutionality, of two taxes so dissimilar in manner of incidence. Designed to be shifted directly to the consumer rather than borne by the business itself, taxes on unit sales are usually justified as amounting in effect to taxes on the consumption of the article taxed, with the dealer serving merely as a collecting agency.[61] Thus the gasoline tax, as it exists in most of the states, while ostensibly a sales tax, is in fact a charge paid by the consumer for the use of the roads.[62]

The chief objection to a sales tax on the general run of commodities is that it can not be so easily shifted as can a tax on a specific commodity.[63] This criticism applies with especial force to the type of gross sales tax which is so imposed that the chain stores bear the major part of its burden. Because of the across-the-street competition between chains and independent merchants, the former can ill afford to add the tax to the sales price of the article.[64] But the competitive disadvantage created by such a tax may be balanced by the very economies attendant upon large-scale operation which the taxes are intended to neutralize. Furthermore, a nation-wide chain of stores, by distributing throughout its entire sales territory the burden imposed by a state tax would be able to maintain its advantageous position in the taxing state at the expense of consumers elsewhere. Considerations of this sort, however, will probably find little expression in the opinions of courts confronted with the issue of statutory validity,[65] and it is difficult to see upon what technical grounds a graduated sales tax such as that imposed by the Kentucky statute can be held invalid.

The problems raised by the intentionally discriminatory character of chain store taxes are further complicated by the recent

[58] State Tax Comm'n v. Hughes, 219 Ky. 432, 293 S. W. 944 (1927).

[59] Patton v. Brady, *op. cit. supra* note 54; Exchange Drug Co. v. Long, 281 U. S. 693, 50 Sup. Ct. 244 (1930) (cigarettes).

[60] Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 33 Sup. Ct. 441 (1913).

[61] See Pierce Oil Co. v. Hopkins, *supra* note 56, at 139, 44 Sup. Ct. at 251; Wham, *op. cit. supra* note 55; (1922) 22 MICH. L. REV. 618.

[62] *Cf.* Haig, *Business Taxation* (Nov. 1930) CHAIN STORE AGE 34, 35.

[63] See Lionel's Cigar Store v. McFarland, 162 La. 956, 968, 111 So. 341, 347 (1927).

[64] ANNUAL REPORT OF THE NATIONAL CHAIN STORE ASSOCIATION (Oct. 1, 1930) 23; *cf.* Taft, *op. cit. supra* note 4, at 29.

[65] *Cf.* Heisler v. Thomas-Colliery Co., *supra* note 25, at 258, 43 Sup. Ct. at 85.

trend to business taxation. A general conviction [66] that realty has been made to bear a disproportionately heavy tax burden in the past has caused many states to turn to business taxation as an alternative source of revenue.[67] While a few states [68] prefer the net income tax, as resting directly on the business rather than on the consuming public, the sales tax is the more obvious solution.[69] Hence in considering the motives behind this form of taxation, it will be hard for the courts to distinguish hostility towards the chain store from a genuine need of state funds.

The current situation, in respect to the taxing of chain stores, is a lesson in the use of devices. It demonstrates vividly how the identical legislative purpose which has been judicially defeated when attempted in one manner may be attained by a strategic shift of contrivance. In its effect on the chain stores, the sales tax is as damaging and discriminatory as any of the license taxes which the courts have labelled unconstitutional. In fact, the condemnation of the earlier device forces recourse to imposition on the chains of a potentially far greater burden.[70] The courts profess to regard primarily the practical operation of a tax, and to deal with it according to its effect.[71] Yet where a tax statute classifies without assuming to classify in the constitutional sense, inequalities of result have been said to grow out of inequalities of business conditions, which in turn have been said to be beyond control by law.[72] Whether those concerns whose extensive field of operation enables them to cut prices to correspond with a lower unit cost should be handicapped in order to protect the competing local yeomanry of the trade is a question dependent for its solution upon debatable issues of policy. At least it may be predicted that, although a few legisla-

[66] *Cf.* Haig, *op. cit. supra* note 62, at 35. For accounts of the recent agitation in New York State over the need of some relief from taxation on real estate, see New York Times, Nov. 18, 19, 20, 1930.

[67] Taft, *op. cit. supra* note 4, at 30.

[68] California, Massachusetts, New York, Oregon, Washington and Wisconsin have enacted net income taxes. See Haig, *op. cit. supra* note 62, at 34.

[69] In addition to the states which have adapted a sales tax, it has been proposed in Connecticut, Florida, Illinois, Iowa, Louisiana, Minnesota, Missouri, New York, Pennsylvania, Tennessee, Texas, Vermont, Washington and West Virginia. See ANNUAL REPORT OF THE NATIONAL CHAIN STORE ASSOCIATION (Oct. 1, 1930) 16-22.

[70] Georgia, for instance, has already considered adding to the tax rate and it will probably be increased periodically. See Taft, *op. cit. supra* note 4, at 29.

[71] See Frick v. Pennsylvania, 268 U. S. 473, 494, 45 Sup. Ct. 603, 604 (1924); Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 222, 48 Sup. Ct. 451, 453 (1927).

[72] See Sanchez Morales v. Gallardo, 18 F. (2d) 550, 552 (C. C. A. 1st, 1929).

tures, encouraged by the *Maxwell* decision in North Carolina, will proceed to enact license taxes, the future history of anti-chain store agitation, should it survive, will be written in terms of the sales tax on merchandise.

FEDERAL JURISDICTION OF FOREIGN CORPORATIONS AS LIMITED BY DOCTRINAL IMMUNITY OF FEDERAL JURISDICTION TO MODIFICATION BY STATE STATUTE

SINCE at least 1838[1] there has existed the venerable doctrine that the jurisdiction of a federal court can neither be restricted nor enlarged by the statutes of a state. In the recent case of *McNeal-Edwards Co. v. Frank L. Young Co.*[2] this principle once again comes to light. In that case a Virginia corporation, which had done no business in Massachusetts, brought suit against a Massachusetts corporation in the Federal District Court of Massachusetts for the conversion of drums used in shipping oil ordered by the Massachusetts company. The latter then brought suit for breach of warranty in the same court against the Virginia corporation and served process under a Massachusetts statute[3] providing that:

"If an action is brought by a person not an inhabitant of the commonwealth or who cannot be found herein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other. . . . The writ in such cross action may be served on the attorney of record for the plaintiff in the original action, and such service shall be as valid and effectual as if made on the party himself in the commonwealth."

Relying on the above oft-repeated formula, the Circuit Court of Appeals for the First Circuit (Judge Anderson dissenting) held that the statute was inapplicable to suits brought in a Federal court, notwithstanding the Conformity Act,[4] and directed that the case be dismissed for want of jurisdiction. The Court said:

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[1] See Toland v. Sprague, 12 Pet. 300, 328 (U. S. 1838).

[2] 42 F. (2d) 362 (C. C. A. 1st, 1930).

[3] MASS. GEN. LAW (1921) c. 227, §§ 2, 3.

[4] "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding." 17 STAT. 197 (1872), 28 U. S. C. § 724 (1926). For criticism of the Conformity Act as unsatisfactory, see, DOBIE, FEDERAL PROCEDURE (1927) 585; Comment (1927) 36 YALE L. J. 853.

"It is well settled that a question of this character [the acquisition of jurisdiction over a defendant by the service of process] involves the jurisdiction of the court as a federal court, which jurisdiction cannot be enlarged or abridged by any statute of a state or the decisions of its courts." [5]

The cases which have held that a state statute can neither restrict nor enlarge the jurisdiction of a federal court, may be divided into three categories. First, there are those cases in which it is held that where Congress has prescribed a rule for the federal courts to follow, such a rule is to be given precedence over state legislation on the same matter.[6] But since in the instant case no federal legislation covers the field with which the Massachusetts statute is concerned, and since the case was properly cognizable by the federal court by virtue of diversity of citizenship [7] and by the fact that suit was brought in a district prescribed by the Judicial Code,[8] there would seem to be no such conflict between state and federal legislation as would render the cases in the first category controlling. Those cases comprising the second category, where it is held that the privilege of resorting to the federal courts cannot be removed by state statute, are similarly inapplicable to the situation presented by the instant

[5] 42 F. (2d) at 367. The court said further: "The statute of Massachuetts (chapter 227, §§ 2-4), if upheld and enforced in the federal court for the district of Massachusetts, would contravene the acts of Congress in two important particulars: First, it would abridge the right given a nonresident to sue in that court by making the exercise of the right conditional upon its waiving personal service of process upon it, in case any citizen or citizens of Massachusetts, made defendants in its suit, should conclude to bring independent actions against it. And, second, it would enlarge the jurisdiction of the federal court in the district of Massachusetts, as to suits brought against the nonresident by doing away with the requirement of personal service of process and substituting in its place the constructive service provided for in the state statute. For these reasons we think the statute of Massachusetts cannot be upheld and enforced in the District Court for Massachusetts, whether its enforcement would or would not contravene the due process clause of the Fourteenth Amendment, which the Supreme Court in Riverside Mills v. Menefee, supra, its latest decision on the question, held that it would." *Ibid.* 371.

[6] Belonging to this class are the following four cases, cited by the present court, in which the conflict concerned a congressional provision for appeal from the lower federal courts to the Supreme Court on a question of jurisdiction. Southern Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44 (1892); Mexican Central R. R. v. Pinkney, 149 U. S. 194, 13 Sup. Ct. 859 (1893); Davidson Marble Co. v. Gibson, 213 U. S. 10, 29 Sup. Ct. 324 (1909); Mechanical Appliance Co. v. Castelman, 215 U. S. 437, 30 Sup. Ct. 125 (1910). See 25 STAT. 693 (1889) and 26 STAT. 826 (1891).

[7] 18 STAT. 137 (1875), 28 U. S. C. § 41 (1926).

[8] Where the federal jurisdiction is founded on diversity of citizenship, "suit shall be brought only in the district of the residence of either the plaintiff or defendant." 18 STAT. 137 (1875), 28 U. S. C. § 112 (1926).

decision.[9] And the cases making up the third category, where a federal court has refused to apply a state statute on the ground that the statute violated the due process clause,[10] are likewise hardly decisive of the present case once it is assumed, as the court does in the instant case, that it is unnecessary to decide whether the statute violates this clause.[11] Thus it would appear that none of the decisions setting out the general doctrine that state law cannot modify federal jurisdiction stand as direct authority for the present decision.[12]

On the other hand, although little direct authority has been found to the effect that the particular Massachusetts statute under discussion permits a counter suit against a foreign corporation in a federal court under the facts of the principal case,[13] nevertheless, such a result might well be supported by numerous federal cases in which state statutes have had the effect of modifying the scope of federal court activity despite the ancient formula upon which the instant court relied. In *Amy v. Watertown*,[14] the Supreme Court of the United States held that a service normally valid in a federal court was invalid because of a state statute. There, as in the present situation, the case was properly cognizable by the particular federal court because of diversity of citizenship and the fact that suit was brought in the proper district as provided by the judicial code. Yet there was a dismissal of the suit in the *Watertown* case because of a

[9] Chicago & N. W. Ry v. Whitton, 13 Wall. 270 (U. S. 1871); Southern Pacific Co. v. Denton, *supra* note 6; Barrow Steamship v. Kane, 170 U. S. 100, 18 Sup. Ct. 526 (1898); See DOBIE, *op. cit. supra* note 4, at 337 *et seq.*

[10] Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559 (1895). That the Supreme Court considers the Goldey case to have been decided on due process grounds, see Riverside Mills v. Menefee, 237 U. S. 189, 35 Sup. Ct. 579 (1914). Nevertheless, the instant court relied strongly on the general language of the Goldey case to sustain its decision.

[11] See *supra* note 5.

[12] Federal equity cases, having been specifically excluded from the Conformity Act, are not relevant to the present discussion. Colman v. American Warp Drawing Mach. Co., 235 Fed. 531 (D. Mass. 1915).

[13] Two cases in the Federal District Court of Massachusetts have held that the statute under consideration applies to suits originated in those courts. Arkwright Mills v. Aultman Co., 128 Fed. 195 (C. C. D. Mass. 1904), held that the Massachusetts statute applied as an extension of the law of set-off, and Huntington Mfg. Co. v. Bradford Worsted Co., 37 F. (2d) 730 (D. Mass. 1915), held that the statute applies even where the attorney on whom service was made was employed by an assignee of the non-residents claim. Two further federal cases recognized, without discussion, the applicability of the statute. Colman v. American Warp Drawing Mach. Co., *supra* note 12; Sherburne Co. v. Willenstein Kraus & Co., 285 Fed. 793, 794 (D. Mass. 1923).

[14] 130 U. S. 301, 9 Sup. Ct. 530 (1889). The state mode of service on foreign corporations is followed in federal courts. McCord Lumber Co. v. Doyle, 97 Fed. 22 (C. C. A. 8th, 1899), *certiorari* denied, 176 U. S. 682, 20 Sup. Ct. 1025 (1900). For a collection of cases see, 14 ROSE'S NOTES 714.

state statute, while in the instant decision it was dismissed in spite of such a statute. Persuasive general authority for reaching a result contrary to that of the instant court is likewise to be found in cases which hold valid a service of process in a federal court, made pursuant to a state statute, upon one designated by the statute as the corporate process agent but who is not otherwise an agent of the corporation served.[15] Such a contrary result might also be supported by decisions in which it has been held that state statutes providing for set-offs or counterclaims in actions at law may be invoked as the basis for a similar proceeding in a federal court.[16] And without multiplying examples unduly, this conclusion might be further justified by the numerout instances where a new right created by state law is held enforceable in a federal court with the result that the total number of causes triable in a federal court is enlarged by state acts.[17]

Yet before considering whether this particular statute should have been held to allow a counter suit in a federal court in Massachusetts, it seems advisable to determine whether the statute would contravene the constitutional guarantee of due process were the counter suit brought in the prescribed manner in a Massachusetts state tribunal. Clearly if there exists a constitutional bar to prevent even a state court from obtaining jurisdiction in the manner permitted by the statute, then the effect of this statute upon the jurisdiction of a federal court becomes academic. Mr. Justice Holmes, speaking for the Supreme Court of Massachusetts in *Aldrich v. Blatchford & Co.*,[18] had little or no doubt of the constitutionality of this same statute. Whatever constitutional objections to this particular type of statute do exist, appear to center about the question of due process; and the due process issue in turn seems to hinge upon whether the statute makes reasonable provision for assuring a defendant of notice

[15] Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707 (1903); American Railway Express Co. v. Royster Guano Co., 273 U. S. 274, 47 Sup. Ct. 355 (1925). See Cahill, *Jurisdiction over Foreign Corporations* (1917) 30 HARV. L. REV. 676, 691.

[16] Datson v. Kirk, 180 Fed. 14 (C. C. A. 4th, 1910); Woodlawn Farm Dairy Co. v. Erie R.R., 282 Fed. 278 (D. Pa. 1921); *cf.* S. M. Hess & Bro. v. Small, 288 Fed. 995 (E. D. N. Y. 1923) (N. Y. statute providing for summary judgment held applicable to federal court). See Dunshane v. Benedict, 120 U. S. 630, 636, 7 Sup. Ct. 696, 699 (1887). For a collection of cases, see 28 U. S. C. A. (1927) § 724 n. 226.

[17] See DOBIE, *op. cit. supra* note 4, at 337. For an extensive collection of cases, see 28 U. S. C. A. (1927) § 725. Moreover federal courts will not permit the state creating the right to restrict the forum for the remedy. Chicago & N. W. Ry. v. Whitton, *supra* note 9. No attempt is made herein to discuss the nebulous distinction between increasing the number of causes and "enlarging the jurisdiction." Such distinctions usually result in meaningless obscurity.

[18] 175 Mass. 369, 56 N. E. 700 (1900).

of suit and upon whether the court in which suit is brought has jurisdiction in the sense of power over the defendant.

With respect to the notice requirement, it is generally held that where the statutory process agent is not otherwise an agent of the defendant, it is necessary that the statute objectively show that notice is required to be received by the defendant.[19] But where the person to be served is otherwise an agent of the defendant, it is only necessary that he be an agent of sufficient responsibility to warrant assumption that his principal will receive notice.[20] In view of the confidential relation between attorney and client it would seem that the statute under consideration satisfies this requirement of notice.[21]

The traditional starting point in the determination of whether a court has jurisdiction in the sense of power over the defendant is the famous doctrine of *Pennoyer v. Neff* [22] that "process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory, and respond to proceedings against them." [23] But even if foreign corporations to which the instant statute is applicable be regarded as parties domiciled elsewhere than in Massachusetts, it is scarcely necessary to point out that the concept of process has advanced far beyond the requirement that the physical presence of the defendant is necessary to a valid judgment.[24] The cases sustaining statutes providing for jurisdiction over foreign corporations doing business within the state [25] and over non-resident motorists [26] have so expanded the doctrine of *Pennoyer v. Neff* that, whatever the explanation offered, the fact remains that the process of one state can reach out and summon a defendant domiciled elsewhere.

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[19] Wuchter v. Pizzutti, 276 U. S. 13, 48 Sup. Ct. 259 (1928).

[20] If the Massachusetts statute had designated a public official as process agent and had required that notice be given to the defendant, the statute would clearly be valid insofar as notice is concerned. Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632 (1927).

[21] It would appear immaterial that an attorney's implied powers as agent of his client do not include acceptance of original service of process. If such were the case there would be no need for the statute making the bringing of suit an appointment of the attorney as process agent. See, 2 MECHEM, AGENCY (2d ed. 1914) 1743.

[22] 95 U. S. 714 (1877).

[23] *Ibid.* 727.

[24] *Cf.* Dodd, *Jurisdiction in Personal Actions* (1929) 23 ILL. L. REV. 427.

[25] See CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1930) § 98; HENDERSON, POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918) c. V.; SCOTT, FUNDAMENTALS OF PROCEDURE (1922) c. II; Dodd, *op. cit. supra* note 24; Cahill, *op. cit. supra* note 15; Bullington, *Jurisdiction Over Foreign Corporations* (1926) 24 MICH. L. REV. 633; Note (1929) 42 HARV. L. REV. 1063.

[26] *Cf.* Hess v. Palowski, *supra* note 20; Scott, *Jurisdiction of Non-resident Motorists* (1926) 39 HARV. L. REV. 563.

Fully as rational a basis for jurisdiction can be worked out for the instant statute as in the case of a non-resident motorist or a foreign corporation doing business within the state.[27] The recent case of *Douglas v. New York, New Haven & Hartford R. R.*[28] has upheld the right of New York to deny its courts to a non-resident suing a non-resident and older notions of the extent to which courts may go in this direction are undergoing liberal revision.[29] Moreover, the acquisition of jurisdiction in the sense of power by virtue of a non-resident's use of the courts of a state seems as reasonable as the admittedly valid acquisition of jurisdictional power by virtue of a non-resident's use of highways or business opportunities of a state. And if a state can impose jurisdictional conditions upon both interstate corporations [30] doing business within its borders and non-resident motorists [31] using its highways, despite the fact that neither can be entirely excluded, the mere fact that a state cannot completely [32] deny foreign corporations the use of its courts would hardly seem to render a state powerless to condition such use. Furthermore, in view of the admitted constitutionality of state legislation subjecting a plaintiff to a state court's jurisdiction for purposes of set-off and counterclaim, it is but a slight step to hold constitutional a statute merely making service of writ on the plaintiff's attorney a condition of the cross judgment.[33]

Assuming, therefore, that the statute in question is constitutional insofar as a cross suit commenced in a Massachusetts state court is concerned, the problem remains whether the statute should have been classed with those which have served to modify

[27] None of the conventional theories offered to explain the basis of jurisdiction over foreign corporations appears to offer a satisfactory rationale. See GOODRICH, CONFLICT OF LAWS (1927) 140-151.

[28] 279 U. S. 377, 49 Sup. Ct. 25 (1929); see Comment (1930) 39 YALE L. J. 388; Note (1930) 18 CALIF. L. REV. 159.

[29] *Cf.* Foster, *Place of Trial in Civil Actions* (1930) 43 HARV. L. REV. 1217.

[30] International Harvester Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944 (1914).

[31] *Supra* note 26.

[32] International Textbook Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481 (1910); Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 Sup. Ct. 106 (1921).

[33] The statement of the Circuit Court in the instant case that a set off "is a plea or defense filed in the action in which it is pleaded, and not an independent suit" is not convincing, for without a state statute permitting a set-off or counterclaim to be pleaded in the principal action, the defendant's claim would be enforceable only in an independent suit requiring service of original process as in the principal case. And the effect of the set-off or counterclaim statute is to enable the federal court to adjudicate the claim without a service of process which might have been impossible under the particular circumstances. The Massachusetts statute does little more than this. *Cf.* Aldrich v. Blatchford & Co., *supra* note 18.

the jurisdiction of a federal court despite the doctrine that state acts cannot modify that jurisdiction. Since the statute does not attempt to create new grounds for invoking the jurisdiction of a federal court but merely applies where a basis for federal jurisdiction already exists by reason of diversity of citizenship,[34] and since the venue provision of the Judicial Code is satisfied where suit is brought in the district of the residence of either the plaintiff or defendant,[35] it would seem that the statute closely resembles those state laws which have served to modify federal jurisdiction by directing how process may be served.[36] In this respect the statute seems most clearly analogous to the statutes providing for service of process on foreign corporations and on non-resident motorists. In the case of the foreign corporation statutes a federal court admittedly has original jurisdiction and, while there is as yet no decision on the same question with reference to a non-resident motorist, it seems undeniable that federal courts would entertain original suits brought pursuant to the state statutes.

The failure of the instant court to advert to the most closely analogous statutes and its reliance upon a vague formula applied in entirely dissimilar cases seems to result in a very unsatisfactory decision. The denial of jurisdiction is certainly antithetical to the increasingly popular tendency to settle all phases of the litigation in one suit. From the point of view of expediency, the economy of judicial machinery, and the time of all concerned, it is highly desirable that one court and one jury should hear every claim arising out of one transaction.[37] And although such a policy raises the danger of vexatious suits which might have the result of forcing the non-resident to import a large number of witnesses for no legitimate purpose, this consideration loses all force if both the non-resident's suit and the resident's counter suit involve the same witnesses. Probably this cannot well be ascertained before trial and a "same witness rule" would not be workable in itself, but given a device which will permit the court

[34] *Supra* note 7.

[35] *Supra* note 8.

[36] It is fundamental that an objection to jurisdiction in the sense of power cannot be waived; but an objection to the service of process may be waived. *Cf.* Western Loan & Savings Co. v. Butte & Boston Co., 210 U. S. 368, 28 Sup. Ct. 720 (1907). Therefore it would seem that in regulating service of process a state does not attempt to modify federal jurisdiction in the sense of power.

[37] While it is not inevitable that the non-resident's suit will always be tried in conjunction with the resident's counter suit, the actual result would seem to be that they will be tried together. It is suggested that a practical view be taken of what constitutes "one transaction" taking into consideration how a layman would view it objectively. Compare the analogous situation in regard to cause of action. CLARK, CODE PLEADING (1928) 83.

to dismiss a clearly vexatious counter suit the difficulty is solved. Such a device is at hand, for, as has been pointed out:

"A direct, simple, and flexible way of meeting the issue [of the vexatious suit] is to dismiss or stay an action whenever it appears that some other available forum would better meet the ends of justice—to recognize something like the civil law plea of *forum non conveniens*. While American courts have not been employing the Latin phrase they have been dismissing on grounds of convenience." [38]

As a suggestion for future statutes of this kind, it may prove desirable to obviate this possible objection by requiring the resident to give suitable bond.

If the resident's suit is not vexatious there seems to be no reason for preferring one party's convenience in regard to the transportation of witnesses. Furthermore since the non-resident has commenced the litigation he would appear to be the logical one to bring all necessary witnesses for a complete settlement, especially as he will probably need approximately the same witnesses in both actions. Likewise, although one of the purposes of the federal system is to give citizens of different states a forum unprejudiced by state bias, the Massachusetts statute merely attempts, if the non-resident prefers the federal courts, to subject him to the same unbiased forum for a decision of the claim raised against him.

In view of the current effort to limit the number of cases appearing in the federal courts,[39] the holding of the instant case has an especially unfortunate result. Should non-residents stand on an equal footing in both state and federal courts many of the cases which are now rushed into the federal courts would be decided by state tribunals. But as long as the non-resident is afforded an immunity in a federal court not enjoyed in a state court, it is inevitable that the federal forum will be chosen whenever possible.

POWER OF COMMERCIAL BANKS TO ACT AS AGENT IN STOCK PURCHASE TRANSACTIONS

RECENT decisions of the New York Court of Appeals indicate important developments in the power of banks to act as agent for an undisclosed principal in stock trading transactions. Such transactions usually occur where a customer of a bank orders stock through his bank and arranges for payment either by in-

[38] Foster, *op. cit. supra* note 29, at 1239. *Cf.* Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law* (1929) 29 COL. L. REV. 1.

[39] See FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT (1927) 292.

structing the bank to charge an already adequate account or by negotiating a loan and pledging the ordered stock as collateral, the bank in either case completing the transaction by a direct purchase from the broker. In *Block v. Pennsylvania Exchange Bank*[1] the plaintiff stockbroker sought damages for breach of contract occasioned by the refusal of the defendant bank to accept delivery of certain shares ordered by it while "acting as agent for a third party or parties unknown." The defendant alleged the contract was *ultra vires* and "illegal, void and against public policy." In an opinion reversing the Appellate Division[2] and upholding the validity of the contract, Chief Judge Cardozo interpreted the New York Banking Law as permitting a bank to contract for the purchase of shares where it acted as agent for an undisclosed principal.

The attitude of the Court of Appeals in the *Block* case was foreshadowed by its decision several months previously in *Dyer v. Broadway Central Bank*.[3] In that case a demurrer interposed in an action by a broker for damages resulting from the refusal of a bank to accept delivery of shares ordered by it was overruled, the Court declaring that the contract was not *ultra vires per se* and that if any illegality existed it must be set forth in the pleadings by the defendant bank. In the *Block* case the Court sustained its decision by asserting that the business of a bank is to substitute its credit for the credit of its customer and that the presence of risk in such a credit substitution, unless "so inordinate as to be a speculative enterprise," is no criterion of the power of a bank to engage in such a transaction. The Court found this method of transacting business so widely established as to merit judicial recognition and regarded the existence of this practice without challenge as leading to the conclusion that it is properly within the scope of business incidental to banking.

Statutes authorizing the business of banking have consistently been narrowly construed, particularly where there is involved the *ultra vires* ownership of stock.[4] Typically these statutes con-

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[1] 253 N. Y. 227, 170 N. E. 900 (1930).

[2] Block v. Pennsylvania Exchange Bank, 227 App. Div. 711, 236 N. Y. 754 (1st Dep't 1929).

[3] 252 N. Y. 430, 169 N. E. 635 (1930). The original complaint alleged that the purchases were made "for and on account of the defendant." On dismissal of this complaint in the Appellate Division, Dyer v. Broadway Central Bank, 225 App. Div. 366, 233 N. Y. Supp. 96 (1st Dep't 1929), it was amended to read: "the plaintiffs, as brokers, at the request of the defendants, and on its promise to pay therefor immediately on delivery," purchased the ordered stock. See (1930) 4 ST. JOHN'S L. REV. 291; (1930) 6 N. Y. U. L. Q. REV. 483.

[4] California National Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831 (1897) (ownership of shares in a savings bank illegal); First National

tain detailed enumerations of banking powers. Contracts involving the exercise of powers not expressed or authorized by necessary implication have been declared *ultra vires* and, especially in the federal courts, not only voidable but void.[5] The peculiarly fiduciary nature of banking, as compared with the ordinary corporate business,[6] together with the unprotected position of the depositors, has served to justify such strict regulation.[7] Consequently the *Block* decision is apparently a marked departure from the usual statutory construction, inasmuch as the applicable New York statute neither specifically grants a commercial bank power to purchase stock,[8] nor, until the instant

Bank v. Converse, 200 U. S. 425, 26 Sup. Ct. 306 (1906) (acceptance of stock of reorganized corporation in lieu of old claim *ultra vires*); Merchants National Bank v. Wehrmann, 202 U. S. 295, 26 Sup. Ct. 613 (1906) (bank taking shares in partnership as collateral not owner for purposes of partnership liability); *cf.* City of Goodland v. Bank of Darlington, 74 Mo. App. 365 (1898). But a national bank can transfer complete title to stock, though its acquisition was *ultra vires*. Barron v. McKinnon, 196 Fed. 933 (C. C. A. 1st, 1912).

[5] See Greene v. First National Bank, 172 Minn. 310, 313, 215 N. W. 213, 214 (1927), where a bank sold mortgages and guaranteed payment. The court said that an "implied prohibition against such dealings resulted from failure of Congress to grant the power." The court further stated that it is "firmly settled by the federal decisions that a contract made by a corporation beyond the scope of its powers, express or implied . . . cannot be enforced or rendered enforceable by the application of the doctrine of estoppel." *Cf.* also Schofield v. Goodrich Bros. Banking Co., 98 Fed. 271 (C. C. A. 8th, 1899).

[6] See Gause v. Commonwealth, 196 N. Y. 134, 153, 89 N. E. 476, 482 (1909).

[7] Both national and state banks may accept shares as collateral for a loan and obtain complete ownership by foreclosure proceedings. Westminster Bank v. Electrical Works, 73 N. H. 465, 62 Atl. 971 (1906) (bank entitled to transfer on corporate books); Bennett v. American Bank & Trust Co., 162 Ga. 718, 134 S. E. 781 (1926) (private foreclosure sale); Latimer & Inglis v. State Bank, 102 Iowa 162, 71 N. W. 225 (1897); Haynes v. Kershaw, 22 F. (2d) 735 (C. C. A. 5th, 1927). Shares obtained in this manner must be disposed of at an early date. Such shares cannot be supplemented by purchases for the purpose of getting control of the corporation. Veigel v. Dakota Trust & Savings Bank, 225 N. W. 657. (S. D. 1929). *Cf.* (1929) 14 MINN. L. REV. 173.

[8] N. Y. CONS. LAWS (Cahill, 1930) c. 3, § 106 (1), similar to the National Banking Act, provides for the exercise of "all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion, and by lending money on real or personal security." Other subsections contain specific references to the power to purchase stock and investment securities. Under § 106 (3) a bank is empowered "to purchase and hold any stocks or bonds or interest-bearing obligations of the United States or of the state of New York or of any city, county, town or village of this state, the interest on which is not in arrears;" under § 106 (4), to purchase stock in federal reserve system; under § 106 (5), to purchase stock

decision, was it supposed to grant such power by implication.[9] Moreover, since the defense of incapacity to contract would seem available to the agent of an undisclosed principal if it were available had the agent actually been a principal,[10] the fact that the bank in the *Block* case acted as an agent[11] should not, at least theoretically, have influenced the decision.

It is sometimes said that where the *ultra vires* contract of a bank is executed or the bank has received benefits from its partial execution the defense of *ultra vires* is not available.[12] This

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of any New York deposit company, provided the purchase has written approval of the superintendent of banks; to purchase up to 10% of its capital and surplus, the capital stock of an investment company, a foreign banking corporation and the "capital stock of any corporation organized under section twenty-five-a of the federal reserve act and having its home office in the state of New York."

[9] In Jemison v. Citizens Savings Bank, 122 N. Y. 135, 25 N. E. 264 (1890), the defendant savings bank bought and sold cotton for future delivery through the plaintiffs, members of the cotton exchange in New York. The defendant advised the plaintiff it was acting as agent for its customers but failed to disclose its customer's name. The Court of Appeals held the contract *ultra vires* and, since there had been no transfer to the defendants of title to the cotton, concluded that the contract had not been so executed as to estop the bank from setting up this defense. This case was distinguished in the Block decision on the ground that a savings and not a commercial bank was involved. But compare on this point Bobb v. Savings Bank of Louisville, 23 Ky. 817, 64 S. W. 494 (1884); Sistare v. Best, 88 N. Y. 527 (1882); Nassau Bank v. Jones, 95 N. Y. 115 (1884) (no recovery where bank sued co-principal on stock transaction); Central National Bank v. White, 139 N. Y. 631, 34 N. E. 1065 (1893) (practice of a bank purchasing shares indirectly involved).

[10] Compare, for example, the case of an infant acting for an undisclosed principal. "Neither does such a relation afford to third persons who may deal with the infant agent, that protection which would be insured to them if the agent were sui juris; for it would not be contended, for example, that, in the absence of fraud, the infant would be bound by an implied warranty of authority, or that, failing to bind his principal, he bound himself." MECHEM, AGENCY (2d ed. 1914) § 155.

[11] A number of cases involving both state and national banks have held the attempt of a bank to act as broker or agent an *ultra vires* act. First National Bank v. Hoch, 89 Pa. 324 (1879); Enmerling v. First National Bank, 97 Fed. 739 (C. C. A. 8th, 1899); L'Herbette v. Pittsfield National Bank, 162 Mass. 137, 38 N. E. 368 (1884); Hotchkin v. Third National Bank, 219 Mass. 234, 106 N. E. 974 (1914) (bank's contract to sell stock for undisclosed principal not enforceable by buyer); Weckler v. First National Bank, 42 Md. 581 (1875). *Cf.* Jemison v. Citizens Savings Bank, *supra* note 9.

[12] *Cf.* American Surety Co. v. Phillipine National Bank, 245 N. Y. 116, 156 N. E. 634 (1927). The plaintiff successfully defeated a plea of *ultra vires* raised by a bank on its contract of indemnity where it had received "the full benefit of the plaintiff's performance." As is pointed out in (1928) 28 COL. L. REV. 101, however, the benefit received by the bank under the peculiar facts of the case approached a nullity. City of Goodland v. Bank of Darlington, *supra* note 4 (purchase of stock in another bank not being

is usually true, however, only outside the federal courts.[13] By applying this reasoning to the instant situation the Court might have allowed the plaintiff broker to recover, since, under prevailing New York decisions, upon completion of the purchase the broker becomes a pledgee of the stock and the broker's customer the pledgor, despite the absence of physical delivery to the customer.[14] The contract of purchase might thus be considered as executed. Such decisions, however, based on the execution or non-execution of a contract, appear more technical than persuasive; it is believed the outcome of cases involving stock purchases on the part of the bank depends rather upon the opinion of the court as to the seriousness of the risks to which general depositors are subjected[15] by the allegedly illegal transaction.[16]

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malum in se nor *malum prohibitum*, but only *ultra vires*, purchasing bank was held for double liability); Citizens Bank v. Bank of Waddy, 126 Ky. 169, 103 S. W. 249 (1907) (recovery by plaintiff where amount of loan to bank exceeded its borrowing powers).

[13] *Cf.* First National Bank v. National Exchange Bank, 92 U. S. 122 (1875); California Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831 (1897); Concord Bank v. Hawkins, 174 U. S. 364, 9 Sup. Ct. 739 (1899) (benefits received in the form of dividends). See 3 COOK, CORPORATIONS (8th ed. 1923) § 681: "In the Federal Courts . . . the old rule against *ultra vires* contracts is upheld in all its rigor and applied with all its severity." But *cf.* Citizens Central National Bank v. Appleton, 216 U. S. 196, 30 Sup. Ct. 364 (1910) (national bank held to extent of benefits received on guaranty of payment); Carr v. National Bank & Loan Co., 43 App. Div. 10, 59 N. Y. Supp. 618 (4th Dep't, 1899), *aff'd*, 167 N. Y. 375, 60 N. E. 649 (1901). But the *ultra vires* act does not relieve the bank of obligation to account for securities given it as agent for investment or collection. Enmerling v. First National Bank, 97 Fed. 739 (C. C. A. 8th, 1899); City National Bank v. Martin, 70 Tex. 643, 8 S. W. 507 (1888) (bank liable for proceeds of item given it for collection); L'Herbette v. Pittsfield National Bank, *supra* note 10 (unenforceable brokerage agreement does not prevent recovery of money left with bank for investment). *Cf.* Verrill v. First National Bank, 80 Ore. 550, 157 Pac. 813 (1916).

[14] Markham v. Jandon, 41 N. Y. 235 (1869); Content v. Banner, 184 N. Y. 121, 76 N. E. 913 (1906). Both decisions involved suits by customers against brokers for conversion of stock, which in the first of these cases was bought on margin. It does not appear in either the Dyer or the Block case whether the purchases were on margin but Mr. Justice Frankenthaler in Dyer v. Broadway Central Bank, 130 Misc. 842, 843, 225 N. Y. Supp. 525, 526 (Sup. Ct. 1927) said in part: "The legal effect of a broker's purchase of stock for a customer, whether the latter buys on margin or the broker advances the entire price, is exactly the same as if the stock were delivered to the customer and then pledged by the latter with the broker as security for his advances." *Cf.* Mullen v. Quinlan, 195 N. Y. 109, 87 N. E. 1078 (1909); La Marchant v. Moore, 150 N. Y. 209, 44 N. E. 770 (1896). But *cf.* Jemison v. Savings Bank, *supra* note 9.

[15] Compare, for example, the risk of loss to depositors in permitting a bank to pledge its assets to secure deposits, Divide Co. v. Baird, 55 N. D. 45, 212 N. W. 236 (1926), with the loss likely to result from purchasing stock in an electric company for the sole purpose of lighting the banking house, Farmers State Bank v. Richter, 48 N. D. 1233, 189 N. W. 243 (1922),

From the point of view of risk to the depositor one of the most serious questions raised by the *Block* decision concerns the possibility of the subjection of the assets of a bank to a charge for the payment of stock purchases, even where the bank has admittedly ordered shares for its own account. While by its terms the decision does not sanction the purchase of shares by a bank for speculation or investment purposes, by inference it invites a broker to rely upon the credit of the bank on any order for stock received from a bank. Even were the bank to prove that the shares had been purchased for itself as either a speculation or investment, the broker would be well justified in replying that having investigated the powers of a bank and finding it had, by virtue of the present decision, the power to act as agent, he was warranted in assuming the bank was acting as agent in the particular transaction.[17]

Such a contention on the part of the broker could be supported by decisions in analogous situations wherein the reasonableness of relying upon the proper exercise of a duly authorized power has led the courts to protect those who thus rely. It is well settled that a *bona fide* purchaser may recover from the bank the amount of a certificate of deposit, regular on its face but fraudulently issued.[18] Likewise recovery may be had by a *bona fide* holder of a note, regularly indorsed in the name of the bank, even though the indorsement was illegal as being one for the

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or from subscribing to shares in a local hospital, Moore v. Fremont State Bank, 103 Wash. 249, 173 Pac. 1089 (1917). Contracts like that of the first case are usually declared void, and, although the purchase of stock in another corporation is *ultra vires*, the peculiar circumstances made it permissible in the latter two cases.

[16] In American Surety Co. v. Phillipine National Bank *supra* note 12, at 131, 156 N. E. at 639, Judge Crane remarked that: ". . . the mere giving of a guaranty or of an undertaking is not in or of itself a wrong, illegal, or beyond the corporate powers of a bank. It all depends on the nature of the transaction, and the bank's interest in the property." *Cf.* Citizens Central National Bank v. Appleton, *supra* note 13; Gause v. Commonwealth Trust Co., *supra* note 6 (trust company's authority to buy and sell stocks and bonds does not permit indulgence in hazardous promotion schemes).

[17] See Credit Co. v. Howe Machine Co., 54 Conn. 387, 389 (1887), where, in a case involving an *ultra vires* acceptance of a draft by the officer of a commercial corporation, the court succinctly states this proposition: "To clearly understand those limits [to the rule that one dealing with a corporation is bound to notice restrictions on its powers], a distinction is to be observed between the terms of a power and the circumstances under which it is exercised. Parties may well be required to take notice of the former; but to require them to have knowledge of the latter would, in many cases, result in gross misjustice."

[18] Citizens State Bank v. Security Bank, 222 N. W. 932 (S. D. 1929) (certificate marked "not negotiable"). *Cf.* Harvey Co. v. Cole, 222 Mo. App. 1200, 4 S. W. (2d) 861 (1928).

accommodation of a third person.[19] Although these decisions usually involve purchases of negotiable paper, the courts proceed upon the theory that since such acts on the part of the bank would not be *ultra vires* if properly exercised, the holder is justified in assuming there has been no deviation from the bank's powers in that particular transaction. By analogy in the stock purchase case the broker might be said to act reasonably in relying on the bank's agency powers,[20] rather than be required to slow up large transactions by perfunctory inquiries designed to ascertain ultimate purchasers.

Yet, despite the persuasiveness of these arguments, because ill advised or speculative stock purchases may precipitate insolvency or seriously dissipate an apparently adequate reserve, the resulting risk to general depositors may be sufficiently serious to lead the courts to refuse the broker recovery where stock was ordered for the bank's own account. It may be argued that such a risk is not of any great consequence in view of the fact that distinctions between stock and securities such as bonds, which latter are considered a proper investment of the surplus funds of a bank, have become of diminished importance.[21] Yet it does not appear that stock in general has become so wholly identified with investment securities, at least as concerns the safety of earnings and absence of market fluctuations, as to make it interchangeable in a bank's secondary reserve.[22] Aside from the element of risk to the depositor, mercantile considerations tending to support the *Block* case, such as the facilitation of the customer's credit problem with his broker and the advantage of permitting a bank to make loans on easily realized security, are not available where a bank buys for its own purposes. Nevertheless, since a trust company in New York possesses general agency powers by statute,[23] whatever risk resulting from the misuse of agency powers is placed on state bank depositors by the *Block* case, a similar risk was apparently present beforehand wherever state or national banks were especially author-

[19] Bank of Genesse v. Patchin Bank, 19 N. Y. 312 (1855); Houghton v. First National Bank, 26 Wis. 663 (1870); MORSE, BANKS & BANKING (8th ed. 1928) § 745 (a).

[20] This result finds support by comparison with the adequate protection granted the *bona fide* purchaser of certificates of shares in a corporation representing an issue beyond the authorized capitalization. *Cf.* BALLANTINE, PRIVATE CORPORATIONS (1927) § 138.

[21] *Cf.* Isaacs, *Business Security and Legal Security* (1923) 37 HARV. L REV. 201, 210; Catchings, *Income Out of Common* (1929) 21 J. AM. BANKERS' ASS'N. 880. See statutory sanctions *supra* note 8.

[22] See generally, ATKIN, BANK SECONDARY RESERVE AND INVESTMENT POLICIES (1929).

[23] N. Y. CONS. LAWS (Cahill, 1930) c. 3, § 185. *Cf.* Gause v. Commonwealth Trust Co., *supra* note 6.

ized to exercise such trust powers.[24] But if the suit arose in a federal court against a national bank, where a stricter rule of *ultra vires* prevails,[25] the equities of the depositor's position would almost certainly prevail.

With respect to the risk involved under the actual facts of the *Block* case, where the bank acted only as an agent for an undisclosed principal, the fact that such dealings are so common among banks as well as the fact that the practice apparently receives the non-committal sanction of the Superintendent of Banking, provides some evidence tending to prove the risk was not inordinate.[26] But the inference in the *Block* case that any risk not speculative is permissible in the credit substitutions of a bank is subject to definite limitations. Well defined restrictions have been placed on credit extensions to customers, as for example where the bank attempts to act as a guarantor or to accomodate a customer by allowing overdrafts.[27] Such credit risks may be justified as being in essence a loan to the customer on personal security. But a definite procedure, involving the functioning of a well established internal machinery, has been designed for the purpose of passing on such loans.[28] Not only has banking experience demonstrated the wisdom of requiring such procedure but in a number of instances the law itself has insisted upon it, as may be illustrated by the fact that certification of a check without having the proper credit or cash on hand is a criminal offense.[29] Hence the presence among some banks of a practice of conducting what is virtually a brokerage business[30] is persuasive of the propriety of such dealing only where it is

[24] *Cf.* PATON, BANKS AND BANKING (1926) § 508, where it is suggested that national banks have no power to act as agent in brokerage transactions. But, it is further suggested that since trust powers have been conferred on national banks, courts may be more inclined "to look upon the accomodation of a customer by acting as his financial agent as a legitimate and necessary incident to the banking business." Compare the ruling of the Comptroller of Currency that the provisions of the National Bank and Federal Reserve Acts relating to investments of the bank's own funds have no application to investment of funds held in trust. BULLETIN (1919) 143.

[25] See *supra* note 4.

[26] See Block v. Pennsylvania Exchange Bank, *supra* note 1, at 233, 170 N. E. at 902.

[27] *Cf.* First National Bank of Aiken v. Mott Iron Works, 258 U. S. 240, 42 Sup. Ct. 286 (1922); First National Bank v. American National Bank, 173 Mo. 153, 72 S. W. 1059 (1903); MORSE, *op. cit. supra* note 19, at § 357.

[28] *Cf.* WESTERFIELD, BANKING PRINCIPLES AND PRACTICE (1928) c. 29 and 30.

[29] 40 STAT. 972 (1918); 12 U. S. C. § 501 (1926).

[30] It would seem that investment affiliates are in a safer position to handle this type of business. With the growth of branch, chain and group banking, perhaps even the smaller banks can provide a completely independent window or department where the buying and selling of shares may be safely conducted.

demonstrated that regulatory devices, designed to protect the financial health of the bank, have been equally well developed.

In view of the recent assumption and authorization of erstwhile unpermitted banking functions [31] the *Block* decision may be economically sound and purposely designed to recognize a new banking practice which not only provides a valuable service to customers, most of whom are *bona fide* depositors, but which can be profitably and safely handled by commercial banks. Furthermore, since there have been some well considered efforts directed toward widening the investment powers of banks, it may be found upon proper investigation that certain stocks offer sound investment advantages to banks, and that limited powers should be granted a bank to purchase such stock for its own account. But because of the possible conflict of interests between general depositors and persons relying on the proper exercise of the agency powers now permitted, it is suggested that the problems involved might well be the subject of carefully drafted legislation.[32] Such legislation should be directed toward a definition of the agency and investment powers of banks and the legal position of those relying on such powers. Likewise provision might well be made for insuring within the bank the proper use of such powers.

STATUS OF ITEMS FORWARDED FOR COLLECTION AND REMITTANCE UNDER RECENT BANK COLLECTION LEGISLATION

THE recent epidemic of bank failures has brought into prominence the question of whether a bank forwarding items for collection and remittance to a drawee bank stands in the position of a preferred or general creditor of this latter institution as to the amount of unremitted or unpaid items received by such a drawee bank immediately prior to its bankruptcy. This question is clearly raised in the recent case of *Wachovia Bank & Trust Co.*

[31] The "bond, note and/or debenture" purchasing powers of national banks were gradually assumed until the practice became so common it was specifically recognized by the McFadden Act of 1927. 44 STAT. 1228 (1927); 12 U. S. C. A. § 36 (Supp. 1929). Even before the McFadden act, however, this practice might have been sustained under the bank's general powers to discount or negotiate notes, drafts and "other evidence of debts."

[32] If it should be decided that, in order to protect the general depositor against stock speculation by his bank, the broker is required to assume the risk of the defense of *ultra vires* where the bank was purchasing on its own account, the position of the broker would certainly be prejudiced inequitably, were the bank to interpose this defense as a shield to the liability of some favored customer.

v. Peoples Bank of Darlington,[1] where the plaintiff bank forwarded for collection and remittance checks drawn on the defendant bank. The defendant charged the amounts of the checks to the respective accounts of the drawers and remitted to the plaintiff its cashier's check drawn on a third bank. Before presentment for payment of the cashier's check could be made the defendant closed its doors, whereupon payment was refused. The plaintiff claimed a preference in the distribution of the assets of the defendant under a statute providing that "all items sent by a bank, whether located within or without the state of South Carolina, to a bank in South Carolina for collection, are hereby declared to be a trust fund, and shall be a prior lien on any unassigned assets of such collecting bank." [2] The court denied the claim, holding that the statute was unconstitutional [3] and in any event was not applicable where there had been "no augmentation of assets."

In restricting the scope of the statute to cases where there has been an "augmentation of assets" the court found the phrase "declared to be a trust fund" suggestive of the creation of a new fund upon which the trust could operate.[4] The basis of this interpretation was the belief that to hold otherwise would "grossly impair the rights of the general creditors" by depleting the assets in favor of a creditor whose property was not included in the assets. Whether or not this belief was well founded there is little doubt but that the court, in striving to protect such creditors, freely molded the legislature's words to conform to its own preconceived opinion respecting the expediency of such a statute.[5]

[1] U. S. Daily, Sept. 13, 1930, at 2165 (S. C. 1930). Rehearing granted, October, 1930.

[2] S. C. Acts, 1927, § 2, 369. The statute seems poorly worded, inasmuch as it was not intended to make the items the trust fund, but rather the proceeds of the items.

[3] The constitutional objections were directed both against the sufficiency of the title of the act and against § 1 permitting South Carolina banks to send items direct to the drawee and to receive a draft in payment without being liable as for negligence. The court held this to discriminate against foreign banks. The rationale of this is not clear, for such litigation of necessity applies only to banks within the state and therefore the exclusion of foreign banks can hardly be discriminatory. Furthermore, the propriety of passing upon the point at all is doubtful since it is generally held that the party complaining cannot raise the question of constitutionality on the ground of discrimination unless it is a party discriminated aginst. See Rindge Co. v. Los Angeles, 262 U. S. 700, 710, 43 Sup. Ct. 689, 693 (1922); Powell v. Hargrave, 136 S. C. 345, 352, 134 S. E. 380, 382 (1926); 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 340.

[4] The court adopted the reasons of the Circuit Judge, whose opinion may be found in the transcript of record.

[5] Prior to the passage of this act it was well settled in South Carolina that in a situation similar to that in the instant case the forwarder was not entitled to a preference. Citizens Bank of Pinewood v. Bradley, 136

This limitation imposed upon the applicability of the act follows the view prevailing in the federal,[6] and in a few state,[7] courts that to constitute an "augmentation" there must be an actual increase in the assets. But any distinction between cases where the items are collected by debiting the drawer's account and where the proceeds are collected from an outside source appears of doubtful validity. As has been pointed out, the augmentation requirement may be met by the simple expedient of having the payer first withdraw the money and then immediately redeliver it in payment of the collection item.[8] Little justification can be found for allowing such a fortuitous circumstance to govern the financial position of a third party. To emphasize the element of augmentation, moreover, is to add to the expense, time and uncertainty of liquidation litigation. The question whether there has been the requisite increase is of itself often exceedingly difficult of determination[9] and when it is joined to the concomitant problems of tracing and identifying the trust res,[10] the resulting uncertainty of outcome seriously jeopardizes the attainment of an equitable and predictable distribution of the assets.

Fundamentally the whole controversy over the question raised by the principal case turns upon the degree of protection which the general creditors of a bank are to be accorded as against forwarders of collection items.[11] By means of adhering closely to the theory of a trust res and juggling the relations of the particular parties, federal courts and the majority of the state courts have held the interests of the former to be paramount.[12]

S. C. 511, 134 S. E. 510 (1926); Manuel v. Bradley, 140 S. C. 321, 138 S. E. 815 (1927).

[6] American Can Co. v. Williams, 173 Fed. 420 (C. C. A. 2d, 1910); Ellerbe v. Studebaker Corp., 21 F. (2d) 993 (C. C. A. 4th, 1927); Burnes National Bank v. Spurway, 28 F. (2d) 40 (S. D. Iowa 1928). See Townsend, *Constructive Trusts and Bank Collections* (1930) 39 YALE L. J. 980, 1003 n.86.

[7] Hecker-Jones-Jewell Milling Co. v. Cosmopolitan Trust Co., 242 Mass. 181, 136 N. E. 333 (1922); Zimmerli v. Northern Bank & Trust Co., 111 Wash. 624, 191 Pac. 788 (1920).

[8] See dissent of Faris, J., in Larabee Flour Mills v. First National Bank of Henryetta, 13 F. (2d) 330, 335 (C. C. A. 8th, 1926); Sinclair Refining Co. v. Tierney, 33 N. M. 498, 502, 270 Pac. 792, 793 (1928); Comment (1927) 36 YALE L. J. 682; Note (1929) 14 ST. LOUIS L. REV. 406. But see Hecker-Jones-Jewell Milling Co. v. Cosmopolitan Trust Co., *supra* note 7, at 187, 136 N. E. at 335.

[9] See Turner, *Bank Collections—The Direct Routing Practice* (1930) 39 YALE L. J. 468, 487.

[10] *Ibid.* Much of the difficulty is probably due to lack of understanding of bank practice by the courts and the legal profession. Townsend, *op. cit. supra* note 6, at 1011.

[11] See Turner, *op. cit. supra* note 9, at 487.

[12] A preference is denied either on the theory that after collection the

Various reasons, however, have been brought forward as justifying a balance weighted in favor of the latter.[13] Thus it has been said that the local depositor, because of his opportunity for obtaining first-hand knowledge, should be presumed to have chosen his depository only after satisfying himself as to its financial stability, while the forwarder of an item for collection and remittance not only is frequently unavoidably ignorant of what bank will ultimately receive it, but has no intention of having the collection proceeds mingled with the general funds of the bank or of becoming one of its general creditors.[14] The forwarder, after all, is but a casual patron of a casually selected bank for the brief period necessary for the consummation of a particular and limited transaction.

Such considerations as these, together with the recognition of the need for uniformity in collection rules,[15] have found expression in recent legislative enactments [16] and proposals. These provide simply for certain preferential claims irrespective of

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relation of principal and agent is transformed into that of creditor and debtor, Hecker-Jones-Jewell Milling Co. v. Cosmopolitan Trust Co., *supra* note 7; Love v. Federal Land Bank, 127 So. 720 (Miss. 1930); Citizens Bank of Pinewood v. Bradley, *supra* note 5; Peters Shoe Co. v. Murray, 31 Tex. Civ. App. 259, 71 S. W. 977 (1903); Townsend, *op. cit. supra* note 6, at 986; 1 MORSE, BANKS AND BANKING (6th ed. 1928) § 248, or on the theory that the trust funds cannot be traced, National Bank of the Republic v. Porter, 44 Idaho 514, 258 Pac. 544 (1927); Salem Elevator Works v. Commissioner of Banks, 252 Mass. 366, 148 N. E. 220 (1925); *cf.* (1928) 13 IOWA L. REV. 218. For the federal cases see *supra* note 6.

[13] An increasingly large number of courts have held the proceeds of collection items indorsed for collection and remittance to be impressed with a trust and therefore a preferred claim. Skinner v. Porter, 45 Idaho 530, 263 Pac. 993 (1928); Bank of Poplar Bluff v. Millspaugh, 313 Mo. 412, 281 S. W. 733 (1926); Sinclair Refining Co. v. Turney, *supra* note 8; First State Bank v. O'Bannon, 130 Okla. 206, 266 Pac. 472 (1928); Federal Reserve Bank v. Peters, 139 Va. 45, 123 S. E. 379 (1924); *cf.* Edwards v. Lewis, 98 Fla. 956, 124 So. 746 (1929); Comment (1927) 36 YALE L. J. 684; 2 PATON, DIGEST (1926) 1451a; Townsend, *op. cit. supra* note 6, at 987 n.33. See Notes (1923) 24 A. L. R. 1152; (1926) 42 A. L. R. 754; (1927) 47 A. L. R. 761. For criticisms of this view see (1926) 35 YALE L. J. 627; (1926) 75 U. PA. L. REV. 69; (1930) 36 W. VA. L. Q. 297.

[14] Comment (1927) 36 YALE L. J. 683. In addition the granting of a preference would to a large extent offset the increased risks forced upon the forwarder by the direct routing practice.

[15] The enormous number of bank failures in recent years (see the monthly reports in the FEDERAL RESERVE BULLETIN and the WORLD ALMANAC (1930) 296), coupled with the chaotic state of the law, has emphasized the need for some uniform code of rules which will "expedite and simplify" liquidation proceedings.

[16] The trend in recent legislation has been toward the allowance of a preferred claim. Colo. Laws 1925, c. 63; GA. ANN. CODE (Michie, Supp. 1930) § 2366 (70); Iowa Acts 1929, c. 30, § 11; La. Laws 1926, No. 63; N. C. CODE (1927) c. 14, § 218; Utah Laws 1927, c. 49; Wyo. Laws 1929, c. 141.

whether there has been an "augmentation of assets" or of whether the proceeds can be traced and identified. In 1928 the American Bankers' Association drafted a code of collection rules providing that if at the time of presentment for payment the drawee bank has on deposit to the credit of the drawer an amount sufficient to meet the item, the owner is entitled to a preferential claim upon the assets.[17] This has now been adopted in eleven states,[18] including South Carolina,[19] but the attainment of uniformity even within state lines has been rendered doubtful at the outset by the possible inapplicability of state legislation of this character to national banks.[20] Recently, however, a hearing has been had before the Committee on Banking and Currency in the House of Representatives on a bill proposing that the transferor of a negotiable instrument sent to a national bank for collection shall be a preferred creditor "if such negotiable instrument is drawn against the delivery of an accompanying document of title relating to real or personal property." [21] This bill, of course, grants a preference only in a limited class of transactions.

Much of the criticism directed against the solution provided

[17] Note (1929) 43 HARV. L. REV. 307. Fault may be found with this provision in that inferentially it permits a preference only if the drawer's account is sufficient to meet the item at the time of presentment. Situations may be imagined where the drawer has delayed making arrangements to meet the item until after its presentment, or until he has been informed of its arrival. No good reason appears for denying a preference in such a case.

[18] Ind. Acts 1929, c. 164; Ky. Acts 1930, c. 13; Md. Laws 1929, c. 454; Mo. Laws 1929, p. 205; Neb. Laws 1929, c. 41; N. J. Laws 1929, c. 270; N. M. Laws 1929, c. 138; N. Y. Laws 1929, c. 589; S. C. Acts 1930, p. 1368; Wash. Laws 1929, c. 203; Wis. Laws 1929, c. 354.

[19] This act, which was passed subsequent to the commencement of the action in the Wachovia case, would seem to be open to the same objections which the South Carolina court directed against the earlier statute.

[20] The distribution of the assets of an insolvent national bank is governed by the National Banking Act, which expressly provides for a ratable distribution. 13 STAT. 114 (1864), 12 U. S. C. § 194 (1926). The recognition of preferred claims is due to court decisions alone, and is limited to those cases where the claimant is able to show a trust relationship with the bank, an augmentation of assets produced by property held in trust for him by the bank, and identification of the funds in the hands of the receiver. See cases cited *supra* note 6. It is questionable therefore whether this narrow theory of preference claims can be broadened by state legislation as unrestricted in scope as is the Bankers' Code. See Davis v. Elmira Savings Bank, 161 U. S. 275, 283, 16 Sup. Ct. 502, 503 (1896); First National Bank v. Selden, 120 Fed. 212, 215 (C. C. A. 7th, 1903); Palo Alto County v. Ulrich, 199 Iowa 1, 5, 201 N. W. 132, 133 (1924); Giberston v. Northern Trust Co., 53 N. D. 502, 509, 207 N. W. 42, 44 (1925); *cf.* Cook County National Bank v. United States, 107 U. S. 445, 2 Sup. Ct. 561 (1882); 27 OP. ATT'Y GEN. 37 (1908); 2 MORSE, *op. cit. supra* note 12, at §§ 200, 250 (c).

[21] HEARINGS BEFORE THE COMMITTEE ON BANKING AND CURRENCY ON H. R. 5634 (May 16, 1930).

by the various statutes is based upon the belief, expressed in the *Wachovia* case, that in subjecting all the assets to preferential claims the general creditors would be deprived of the protection to which they are justly entitled. And there is substantial support for this belief. On equitable grounds a bank's general creditors, among which are its depositors, should be assured protection commensurate with their status as an important, if not the most important, class of bank customers.[22] The enlargement of the class of preferred creditors effected by these laws would clearly result in a material diminution of the funds ordinarily available for ratable distribution. While there are no exact data permitting comparison between disbursements of assets to general creditors and those to preferred claimants, the amount going to the latter is already unquestionably large.[23] Any further increase should be made only upon full consideration of the conflicting interests involved.

The Commissioners on Uniform State Laws have drafted a tentative code of collection rules[24] which takes this point into consideration. A trust to the amount of the item is created and the proceeds are deemed traced into the general assets of the bank exclusive of its bank buildings, fixtures and real estate.[25] Thus only the relatively liquid assets are subject to preferred claims, leaving the fixed assets for the general creditors. In this manner a more equitable distribution of the assets is provided for by recognizing the preferred character of the claims of forwarders of collection items without unduly jeopardizing the rights of the general creditors.

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[22] Bank deposit guarantee laws passed by a few states in an attempt to provide this protection to depositors have failed of their purpose and have for the most part been repealed. See Butts, *State Regulation of Banking by Guarantee of Deposits* (1929) 2 MISS. L. J. 208.

[23] In the fiscal year ending October 31, 1929, out of $25,215,143, the total distributable assets of 103 insolvent national banks, the unsecured depositors, with claims aggregating $25,714,590 received only $12,653,830, while the preferred and secured creditors, who were paid in full, received $12,561,313. ANNUAL REPORT OF THE COMPTROLLER OF THE CURRENCY (1929) 24, 25. In North Carolina, out of $1,211,100.17, the total assets distributed, the depositors received $567,263.10, and the preferred creditors $180,409.17. NORTH CAROLINA COMMISSION REPORTS OF THE CONDITION OF THE STATE BANKS (Dec. 31, 1928) VI.

[24] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1929) 261.

[25] *Ibid.* § 23.

SUCCESSIVE PROSECUTIONS BASED ON THE SAME EVIDENCE AS DOUBLE JEOPARDY

THE possibility of splitting what appears to be a single criminal transaction into various component offenses, when combined with the prolific creation of new statutory offenses, tends to render the determination of identity of criminal offenses with respect to a plea of double jeopardy increasingly difficult. Some few courts pass upon the propriety of this plea in a particular instance by inquiring whether the offenses are identical in the sense that the facts which gave rise to both prosecutions were a part of the same transaction.[1] Most jurisdictions, however, while purporting to follow a common majority rule, have variously phrased the test of what constitutes identity of offenses. Thus it has been declared that "if the evidence, which is necessary to support the second indictment, was admissible under the former, was related to the same crime, and was sufficient, if believed by the jury, to have warranted a conviction of that crime, the offenses are identical" but that "if the facts which will convict on the second prosecution would not necessarily have convicted on the first then the first will not be a bar." [2] Other courts following this so-called "same evidence" test phrase it in the following manner: "unless the first of the two indictments was such [that] the prisoner might have been convicted [of the crime alleged therein] upon proof of the facts contained in the second, an acquittal or conviction on the first can be no bar to the second." [3]

Any discussion of the comparative merits of the majority "same evidence" and minority "same transaction" tests will be excluded. Rather it is proposed to indicate the sources of conflict inherent in the majority rule and to suggest a modification of the various statements of that rule so as to permit a higher degree of predictability of result.

In furtherance of this purpose, it would seem essential at the very outset to determine whether the "evidence" to which refer-

[1] New Jersey alone has consistently adhered to the same transaction test. State v. Mowser, 92 N. J. L. 474, 106 Atl. 416 (1919); State v. Cosgrove, 103 N. J. L. 412, 135 Atl. 871 (1927). The test has been applied in Alabama, Oklahoma and Texas. Haraway v. State, 22 Ala. App. 553, 117 So. 612 (1928); Trawick v. Birmingham, 23 Ala. App. 308, 125 So. 211 (1929); Gates v. State, 100 Tex. Cr. 36, 271 S. W. 632 (1925); Doherty v. State, 24 S. W. (2d) 60 (Tex. 1930); Hochderffer v. State, 34 Okla. Cr. 215, 245 Pac. 902 (1926); Crane v. State, 39 Okla. Cr. 41, 263 Pac. 174 (1928). But instances may be found, in these latter jurisdictions, where the court has reached a result inconsistent with the same transaction test. Holcomb v. State, 19 Ala. App. 24, 94 So. 917 (1922); Alarcon v. State, 92 Tex. Cr. 288, 242 S. W. 1056 (1922).

[2] Medlock v. Commonwealth, 216 Ky. 718, 720, 288 S. W. 670, 671 (1926).

[3] State v. McGaughey, 45 S. D. 379, 383, 187 N. W. 717, 718 (1922); Commonwealth v. Crowley, 257 Mass. 590, 595, 154 N. E. 326, 328 (1926).

ence is made in the first statement of the majority rule means the evidence which will be produced in the second prosecution, the evidential facts alleged in the second indictment, or the essential facts alleged in the second indictment. The decisions would indicate a tendency to adopt the last view. Where it has been necessary to distinguish between the evidence to be produced in the second prosecution and the facts alleged in the second indictment, the latter has been held the determining factor.[4] If, however, the courts adopt the view that the second prosecution is barred if the evidentiary facts alleged in the second indictment are sufficient to convict of the offense charged in the first indictment, it is believed that the issue of double jeopardy may often turn upon the accidental inclusion of superfluous allegations. Thus an allegation in a prosecution for statutory rape that "the defendant had intercourse with his daughter, a child under the age of consent" would be sufficient to have supported a conviction of incest charged in a former indictment and thus to constitute the second prosecution double jeopardy despite the fact that the allegation of relationship was immaterial to the charge of rape. Accordingly the better view would seem to be that requiring the essential facts to be sufficient to have convicted of the former offense.

For the purposes of this discussion, the cases in which a plea of double jeopardy has been raised may be grouped into two classes. In the first class will fall those cases where each of the two offenses charged in successive indictments contains at least one essential element which is not included in the other offense, while there may or may not be an element common to each offense. The second class will include those cases where one of the two offenses is included in its entirety in the other greater offense which consists of the former offense plus an additional element.

The result which will be reached by the courts in those cases which fall with the first class may be predicted with a high degree of certainty despite the diverse and careless statements of the majority test. The reason for such uniformity lies in the fact that the essential facts alleged in the second indictment cannot possibly convict of an offense which contains an essential element not included in the offense charged in the second prosecution. So long, therefore, as the courts continue to construe the test as requiring the essential facts alleged in the second indictment to be sufficient to convict of the offense charged in the first indictment, conflicting decisions cannot be reached in

[4] In People v. Brannon, 70 Cal. App. 225, 232, 233 Pac. 88, 91 (1925), the court said: "The true test is, could the defendant have been convicted upon the first indictment upon proof of the facts, not as brought forward in evidence but as alleged in the record of the second."

this class of cases. Thus where there are successive prosecutions, or a prosecution on separate counts in the same indictment, for a conspiracy to commit a substantive offense and for the commission of the offense, the plea of double jeopardy will be disallowed,[5] unless, by statute, a definite substantive offense and a conspiracy to commit such offense have been declared to be degrees of each other and conviction for either may be had under an indictment charging the other.[6] Likewise, where there are successive prosecutions for murder occurring during the commission of a felony and for the felony itself, a prosecution for burglary or robbery following a prosecution for murder does not constitute double jeopardy.[7] Similarly, successive prosecutions for burglary and larceny,[8] robbery and burglary,[9] burglary and receiving stolen property,[10] larceny and knowingly possessing stolen property,[11] carrying a concealed weapon and robbery, murder or assault committed on the same occasion,[12] manslaughter and a violation of the motor vehicle laws,[13] the commission of an offense and permitting or instigating it to be done,[14] embezzle-

[5] Preeman v. United States, 244 Fed. 1 (C. C. A. 7th, 1917); Chew v. United States, 9 F. (2d) 348 (C. C. A. 8th, 1925); Mitchell v. United States, 23 F. (2d) 260 (C. C. A. 9th, 1927); Meucci v. United States, 28 F. (2d) 508 (C. C. A. 9th, 1928); People v. Clensey, 97 Cal. App. 71, 274 Pac. 1018 (1929); Gilpin v. State, 142 Md. 464, 121 Atl. 354 (1923); State v. Nolon, 129 Wash. 284, 224 Pac. 932 (1924).

[6] Ex parte Resler, 115 Neb. 335, 212 N. W. 765 (1927) (murder by poison); Ex parte Berman, 286 Pac. 1043 (Cal. 1930) (bribery).

[7] People v. Andrae, 305 Ill. 530, 137 N. E. 496 (1922) (burglary); Duvall v. State, 111 Ohio St. 657, 146 N. E. 90 (1924) (robbery); State v. Ragan, 123 Kan. 399, 256 Pac. 169 (1927) (robbery); Commonwealth v. Crecorian, 264 Mass. 94, 162 N. E. 7 (1928) (robbery).

[8] Morgan v. Sylvester, 231 Fed. 886 (C. C. A. 8th, 1916) (separate counts); Alarcon v. State, *supra* note 1 (separate counts); People v. Snyder, 241 N. Y. 81, 148 N. E. 796 (1925) (successive prosecutions); State v. Montcrieffe, 165 La. 296, 115 So. 493 (1928) (successive prosecutions).

[9] People v. Brain, 75 Cal. App. 109, 241 Pac. 913 (1925); People v. Case, 77 Cal. App. 477, 246 Pac. 1083 (1926).

[10] State v. Broderick, 191 Iowa 717, 183 N. W. 310 (1921); Alarcon v. State, *supra* note 1.

[11] Singleton v. United States, 294 Fed. 890 (C. C. A. 5th, 1923).

[12] Hopkins v. State, 79 Tex. Cr. 490, 186 S. W. 201 (1916) (murder); Cooper v. State, 16 Ala. App. 76, 75 So. 624 (1917) (assault with intent to murder); Young v. State, 87 Tex. Cr. 184, 222 S. W. 1103 (1920) (assault); People v. Perry, 99 Cal. App. 90, 277 Pac. 1080 (1929) (robbery); State v. Lopez, 169 La. 247, 125 So. 65 (1929) (cattle stealing).

[13] People v. Wilson, 193 Cal. 512, 226 Pac. 5 (1924); State v. Cheeseman, 63 Utah 138, 223 Pac. 762 (1924); State v. Empey, 65 Utah 609, 239 Pac. 25 (1925); People v. McKee, 80 Cal. App. 200, 251 Pac. 675 (1926); Smith v. State, 159 Tenn. 674, 21 S. W. (2d) 400 (1929).

[14] Commonwealth v. Porter, 237 Mass. 1, 129 N. E. 298 (1921) (commission of lewd practices and keeping house where such practices occurred); Tobin v. State, 36 Wyo. 368, 255 Pac. 788 (1927) (conducting gambling game and permitting game to be played).

ment of chattels and embezzlement of money proceeds,[15] obtaining money under false pretenses and larceny,[16] obtaining money under false pretenses and forgery,[17] receiving a bribe and larceny by false pretenses,[18] have all been held not to warrant a plea of double jeopardy.

With respect to other typical situations in the first class of cases in which the plea of double jeopardy is unlikely to succeed, there would seem a virtual uniformity in holding that where the defendant by the same act or successive acts upon the same occasion, commits offenses against two persons, successive prosecutions for the offense against each do not constitute double jeopardy. Such are cases of simultaneous robbery or murder of, or assault upon, two persons. Virtually no conflict is found where there has been a conviction under the first indictment.[19] And even after there has been an acquittal under the first indictment there is no conflict where there was an obvious "intent" directed against each of the persons injured.[20] Where such "intent," however, was directed wholly against one, and a bystander was "unintentionally" injured, the majority of courts have held that an acquittal of the offense against either bars a prosecution for the offense against the other, on the ground that the prior acquittal operates to acquit of the criminal intent essential to each offense.[21] This result has been approved by legal writers despite

[15] People v. Nelson, 70 Cal. App. 476, 233 Pac. 406 (1925); State v. Folger, 204 Iowa 1296, 210 N. W. 580 (1926).

[16] People v. Kirsch, 204 Cal. 599, 269 Pac. 447 (1928).

[17] Binganan v. State, 181 Ark. 94, 24 S. W. (2d) 969 (1930).

[18] Commonwealth v. Crowley, *supra* note 3.

[19] Seiwald v. People, 66 Colo. 332, 182 Pac. 20 (1919) (murder of policeman and the person robbed); State v. Williams, 263 S. W. 195 (Mo. 1924) (robbery of *X* and assault with intent to rob *Y*); Wallace v. Commonwealth, 207 Ky. 122, 268 S. W. 809 (1925). *Contra*: Smith v. State, *supra* note 13. In this last case the court draws a distinction between a single muscular reaction, one shot, and successive acts which are part of the same transaction, successive shots. This distinction has received practically no support elsewhere. People v. Vaughn, 215 Ill. App. 452 (1919). See Commonwealth v. Anderson, 169 Ky. 372, 376, 183 S. W. 898, 899 (1916); State v. Corbitt, 117 S. C. 356, 383, 109 S. E. 133, 142 (1921).

[20] People v. Rodgers, 184 App. Div. 461, 171 N. Y. Supp. 451 (1st Dep't 1918) (attempt to rob *X* and *Y*); People v. Stephens, 297 Ill. 91, 130 N. E. 459 (1921) (murder of one policeman and assault on another); State v. Corbitt, *supra* note 19 (murder of two persons); State v. Billoto, 104 Ohio St. 13, 135 N. E. 285 (1922) (same); Johns v. State, 130 Miss. 803, 95 So. 84 (1923) (robbery of two persons); Blevins v. State, 20 Ala. App. 229, 101 So. 478 (1924) (murder of two persons by confederates); Commonwealth v. Melissari, 298 Pa. 63, 148 Atl. 45 (1929) (murder of two persons).

[21] State v. Houchins, 102 W. Va. 169, 134 S. E. 740 (1926); Moss v. State, 16 Ala. App. 34, 75 So. 179 (1917); Spannell v. State, 83 Tex. Cr. 418, 203 S. W. 357 (1918); Ruffin v. State, 29 Ga. App. 214, 114 S. E. 581 (1922). *Contra*: People v. Brannon, 70 Cal. App. 225, 233 Pac. 88 (1925); State v. Labbee, 134 Wash. 55, 234 Pac. 1049 (1925).

the fact that such a decision is apparently inconsistent with the test of identity of offenses as set forth by the majority rule.[22] It is suggested, however, that this inconsistency is more apparent than real inasmuch as the true basis for barring the second prosecution is not double jeopardy but res judicata.[23] Although the mere proof of an acquittal of an offense containing an element essential to the guilt of an offense charged in a later indictment will not necessarily result in barring the second prosecution on grounds of res judicata, it is clear that where it can be proved to the satisfaction of the court that the prior acquittal was based upon a finding in favor of the defendant as to this factual element such a finding is conclusive in the subsequent prosecution.

There remains to be considered the situation where one of the two offenses is included in its entirety in a greater offense, which consists of the first offense plus an additional element. It is in this type of case that the confusion of decisions predicated upon the majority test of identity of offenses reaches such a height that any attempt at prediction of result is no better than a guess. This situation has most frequently arisen during the past fifteen years in cases involving violations of the prohibition laws. A few of the combinations of offenses most frequently adjudicated in this field are: possession and sale of the same liquor; possession and transportation of the same liquor; possession and manufacture of the same liquor; and manufacture of liquor and possession of the still used.

Where the prosecution for possession of liquor is subsequent in time, the application of the majority test of identity of offenses will not result in barring the second prosecution since the facts alleged in an indictment charging possession would not be sufficient to convict of sale, manufacture or transportation.[24] Yet many courts have held the prosecution for possession to be barred where there has been a conviction of the greater offense and where the only possession charged or to be proved is that which was incident to the sale,[25] manufacture[26] or transportation.[27]

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[22] (1927) 27 COL. L. REV. 324; Comment (1925) 14 CALIF. L. REV. 133.

[23] 2 FREEMAN, JUDGMENTS (5th ed. 1925) § 648.

[24] It is only by a reverse application of the test that the second prosecution would be barred by virtue of the test of identity of offenses. The terms of the test clearly do not authorize this.

[25] Newton v. Commonwealth, 198 Ky. 707, 249 S. W. 1017 (1923); Whitten v. State, 94 Tex. Cr. 144, 250 S. W. 165 (1923); Plunk v. State, 96 Tex. Cr. 205, 256 S. W. 922 (1923). *Contra*: State v. Nodine, 121 Ore. 657, 256 Pac. 387 (1927). *Cf.* State v. Axley, 121 Kan. 881, 250 Pac. 284 (1926) (prosecution for possession and sale on separate counts not double jeopardy); State v. Marchindo, 65 Mont. 431, 211 Pac. 1093 (1922) (same); State v. Ford, 117 Kan. 735, 232 Pac. 1023 (1925) (same). But *cf.* Gray v. United States, 14 F. (2d) 366 (C. C. A. 8th, 1926) (error to impose separate sentences for possession and sale since possession is merged in

These decisions reason that a conviction or acquittal of a greater degree of an offense bars a subsequent prosecution for a lesser degree of the offense, which is included therein whenever a conviction for the lesser degree might have been had under the indictment charging the greater degree. Whether or not a conviction of the lesser degree as such may be had under an indictment charging the greater degree will often be provided for by statute. But the absence of such a statutory provision will not necessarily be conclusive, for it has been held that, even without such provision, a conviction of the greater degree will bar a prosecution for a lesser degree since a conviction of the greater degree is also a conviction of the lesser.[23] An acquittal of the greater degree, however, will not bar a prosecution for the lesser, in the absence of such statutory provision, since the defendant might be innocent of the greater while guilty of the lesser.[29]

Although nothing in the accepted rule of identity of offenses forces a court to hold a prosecution for a lesser degree of an offense to be barred by a conviction of a greater degree, no court which has yet been faced with this situation has failed so to hold.

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sale); Commonwealth v. Heston, 292 Pa. 501, 141 Atl. 287 (1928) (error to impose separate sentences for possession and sale of narcotics).

[26] Barton v. State, 26 Okla Cr. 150, 222 Pac. 1019 (1924). *Contra*: Morgan v. State, 28 Ga. App. 358, 111 S. E. 72 (1922); *cf.* Dexter v. United States, 12 (2d) 777 (C. C. A. 5th, 1926) (conviction on separate counts for manufacture and possession held error); Goetz v. United States, 39 F. (2d) 903 (C. C. A. 5th, 1930) (same).

[27] Commonwealth v. Wilkerson, 201 Ky. 729, 258 S. W. 297 (1924); Coon v. State, 97 Tex. Cr. 645, 263 S. W. 914 (1924); *cf.* State v. Clark, 289 S. W. 963 (Mo. 1927) (conviction on two counts for transportation and possession held error); French v. State, 159 Tenn. 451, 19 S. W. (2d) 276 (1929) (error to impose separate sentence for transportation and possession).

[28] In Gray v. United States, *supra* note 25, at 368, the court said: "In order that an acquittal be a bar to a subsequent indictment for the lesser crime it would seem to be essential that a conviction of such crime might have been had under the indictment for the greater. If a conviction might have been had and was not, there was an implied acquittal. But where a conviction for a less crime cannot be had under an indictment for a greater which includes it, then it is plain that while an acquittal would not or might not be a bar, a conviction of the greater crime would involve the lesser also and would be a bar." In Barton v. State, *supra* note 26, at 1019, the court, in holding a prosecution for possession to be barred by a conviction of manufacture, said: "It is well settled everywhere that a conviction for an offense will bar a subsequent conviction of a lesser degree of that offense or for an offense that is a necessary ingredient of the offense for which a conviction has already been had where both prosecutions grow out of the same transaction."

[29] Mullins v. Commonwealth, 216 Ky. 182, 286 S. W. 1042 (1926) (acquittal of unlawful gift); Commonwealth v. Ladusaw, 226 Ky. 386, 10 S. W. (2d) 1089 (1928) (acquittal of manufacture).

The conflict of decisions is due, rather, to opposing conclusions as to whether a given offense is included in another. Thus the federal courts have held the possession of liquor or of the still to be essential ingredients of the greater offense of manufacture or sale and wholly included therein.[30] State courts have split upon this question.[31] The result reached by the federal courts seems to be founded on sound reasoning where the only possession charged and to be proved is that possession at the time of sale, transportation or manufacture. Those state courts which have reached the opposite conclusion in such a situation have been forced to a refinement of logic which would do credit to the early common law pleader. One reason advanced for holding the possession not to be included in the sale is that the possession, although it will be proved by evidence of the sale, may be cut short the instant prior to delivery and hence considered as complete before the sale is consumated.[32] By the same logic, one might be convicted of murder and subsequently convicted of the assault which culminated in the murder. Another suggested explanation of such a result is that possession is not necessarily included in the sale since one may be guilty of possessing liquor without selling it or may be guilty of selling liquor which is in the manual possession of another.[33] Yet such a situation is purely hypothetical where the defendant has already been convicted of a sale and is now being prosecuted for the possession incident to the sale.[34] It is contended that the decision whether one offense is included in another so as to bar a second prosecution should depend upon the case before the court rather than upon the theoretical possibility of a totally irrelevant fact situation.

Where the prosecution for the lesser crime is prior in time, however, it would appear that the application of the majority test of identity of offenses would operate to bar the prosecution for sale, transportation or manufacture since the facts alleged

[30] Gray v. United States, *supra* note 25 (possession and sale); Dexter v. United States, *supra* note 26 (manufacture and possession of liquor and still used); Goetz v. United States, *supra* note 26 (same).

[31] Cases cited *supra* notes 25, 26, and 27.

[32] State v. Ford, *supra* note 25, at 736, 232 Pac. at 1024.

[33] Chandler v. State, 89 Tex. Cr. 599, 601, 232 S. W. 337, 338 (1921).

[34] The only other situation in which double jeopardy will be pleaded is when there has been an acquittal of the greater offense and (1) the offenses are declared by statute to be degrees of each other, or (2) there is no statutory provision to such effect. In the first case the second prosecution will be barred regardless of the fact that the defendant might be guilty of one without being guilty of the other. In the second case, even though the court admitted the offenses to be degrees of each other, the second prosecution would not be barred since there must either be a conviction of the greater offense or the possibility of a conviction of the lesser under the indictment for the greater.

in the indictment for the greater offense would necessarily convict of a possession which was incident to the greater offense. A few cases have so held.[35] Dicta, but no direct authority, to the contrary have been found.[36] The majority of courts have failed to invoke the test of identity of offenses and have rested their decisions on the principle of degrees of offenses.[37] It would seem clearly that the test of identity of offenses covers this situation by its terms and from a logical point of view should be applied. The state, by successive prosecutions for the possession incident to a sale and for the sale, is clearly guilty of splitting offenses and the second prosecution should be barred.

It has been seen that the generally accepted rule of identity of offenses has proved to be inadequate to explain the decisions involving certain combinations of offenses or to offer a guide to the decisions in the future. It is therefore proposed that the rule be modified in the following manner:

"Two offenses are identical so as to render a second prosecution double jeopardy, if

(1) The essential facts alleged in the second indictment were admissible under the first indictment and, if proved, would, of necessity, have convicted of the offense charged in the first indictment, or

(2) The offense charged in the second indictment was included in its entirety in the greater offense charged in the first indictment and there was a conviction of the greater offense, or might have been a conviction of the lesser offense under the indictment charging the greater offense."

COMMERCIAL USE OF THE HIGHWAY AS A BASIS FOR MOTOR CARRIER REGULATION

THE part which the mammoth bus and giant truck are playing in present day transportation lends new significance to the problem of motor-carrier regulation. While the fact that these vehicles do a business which is sometimes "affected with the public interest" can often be used to subject them to state regulation, potentially the broadest power which the state can wield to control motor transportation for hire is to be derived from the use by these carriers of the public highway.[1] The law has drawn

[35] People v. Cook, 236 Mich. 333, 210 N. W. 296 (1926) (conviction of possession bars prosecution for transportation).

[36] See Tritico v. United States, 4 F. (2d) 664, 665 (C. C. A. 5th, 1925).

[37] Gordon v. State, 127 Miss. 396, 90 So. 95 (1921) (conviction of possession no bar to prosecution for manufacturing); Ussery v. State, 37 Ga. App. 345, 140 S. E. 427 (1927) (same).

[1] See Southern Motorways v. Perry, 39 F. (2d) 145, 146 (N. D. Ga. 1930).

a distinction between the ordinary use of the highway for travel, and its use for purposes of private gain. A vehicle on the road for the former purpose is there as of "right;" one using it in the latter manner has only a "privilege" of use.[2] Obviously, busses, trucks, taxis, and jitneys, whether employed as "common" or "private" carriers, belong to this latter class. In the absence of a "right" to be on the highway, theirs is merely a "privilege" which can be, at least in theory, revoked by the state at any time and for any reason.

The use of public roads for gain as a source of power for state regulation of commercial highway traffic is an old, even if somewhat neglected doctrine. It seems to have evolved from the elementary common law rule that any permanent obstruction of the highway was a nuisance.[3] At an early date it was held that the appropriation of a fixed part of the highway for the purposes of a private business constituted such an obstruction[4] unless sanctioned by the legislature.[5] With the advent of motor traffic, the fact that commercial vehicles were likewise using the roads for purposes of gain was deemed a sufficient basis for declaring their use of the highway a matter of "privilege" and not of "right," even though they obstructed no fixed portion of the road permanently.[6]

Carried to its extreme, such a rule as this, making legislative permission a necessary condition precedent to the privilege of

[2] See Carson v. Woodram, 95 W. Va. 197, 201, 120 S. E. 512, 513 (1923), and cases cited *infra* note 6.

[3] 2 ELLIOT, ROADS AND STREETS (4th ed. 1926) § 827.

[4] Costello v. State, 108 Ala. 45, 18 So. 820 (1895) (setting up a fruit-stand on the street); Rex v. Jones, 3 Camp. 229 (1812) (sawing wood on the highway).

[5] Regina v. Longton Gas Co., 2 El. & El. 650 (1860); Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242 (1878). See Ex Parte Dickey, 76 W. Va. 576, 579, 85 S. E. 781, 782 (1915).

[6] See Packard v. Banton, 264 U. S. 140, 144, 44 Sup. Ct. 257, 259 (1924); Nolen v. Riechman, 225 Fed. 812, 823 (W. D. Tenn. 1915); Lutz v. City of New Orleans, 235 Fed. 978, 981 (E. D. La. 1916); Schoenfeld v. City of Seattle, 265 Fed. 726, 731 (W. D. Wash. 1920); Schlesinger v. City of Atlanta, 161 Ga. 148, 161, 129 S. E. 861, 867 (1925); Chicago Motor Coach Co. v. Chicago, 337 Ill. 200, 207, 169 N. E. 22, 25 (1929); Huston v. City of Des Moines, 176 Iowa 455, 477; 156 N. W. 883, 892 (1916); Decker v. City of Wichita, 109 Kan. 796, 798, 202 Pac. 89, 90, (1921); State v. Barbelais, 101 Me. 512, 514, 64 Atl. 881 (1906); Melconian v. City of Grand Rapids, 218 Mich. 397, 404, 188 N. W. 521, 524 (1922); Willis v. Buck, 81 Mont. 472, 481, 263 Pac. 982, 984 (1928); Morin v. Nunan, 91 N. J. L. 506, 508, 103 Atl. 378, 379 (1918); Philadelphia Jitney Association v. Blankenburg, 24 Pa. D. & C. 1000, 1007 (1915); City of Memphis v. State, 133 Tenn. 83, 97, 179 S. W. 631, 635 (1915); Greene v. San Antonio, 178 S. W. 6, 7 (Tex. Civ. App. 1915); Ex parte Sepulveda, 108 Tex. Cr. Rep. 533, 535, 2 S. W. (2d) 445, 446 (1928); Ex parte Dickey, *supra* note 5; Carson v. Woodram, *supra* note 2; Hadfield v. Lundin, 98 Wash. 657, 660, 168 Pac. 516, 518 (1917).

using the highway for business purposes, might completely subject motor carriers to the capricious fancy of state legislatures. Indeed, it has been argued that the control of the state over carriers on the highway is thus absolutely plenary,[7] and a few courts have thereby sustained, against constitutional attack, extreme and seemingly unreasonable motor regulations.[8]

More important, however, are the cases in which a disregard of the merely privileged position of commercial vehicles on the highway has led to a declaration of unconstitutionality of reasonable regulations of "private" carriers whose business was deemed not to be "affected with the public interest." In *Michigan Public Utilities Commission v. Duke*,[9] the defendant was a private carrier transporting automobile bodies from Detroit, Michigan to Toledo, Ohio. Part of a statute designed to regulate transportation for compensation on the highway declared all motor vehicles engaged in carriage for hire to be "common" carriers. After holding that the requirement of an operating permit, the issuance of which was conditioned upon the taking out of specified insurance, constituted a burden on interstate commerce when applied to this particular defendant, Justice Butler, speaking for the United State Supreme Court, declared:

"Moreover, it is beyond the power of the State by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility . . . for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment." [10]

This dictum evidences a disregard of the distinction between ordinary and commercial traffic. Even though the ordinary private business will seldom be regarded as sufficiently "affected with the public interest" to permit its transformation by legislative enactment into a "public utility" for purposes of regulation, nevertheless, since the "private" carrier is a user of the public road for business purposes, the legislative power might well have been regarded as extending to the imposition of public utility regulations.

In *Frost v. Railway Commission of California*,[11] the Supreme Court of California held that even though the legislature could

[7] See Allen v. City of Bellingham, 95 Wash. 12, 38, 163 Pac. 18, 27 (1917); Schoenfeld v. City of Seattle, *supra* note 6, at 732.

[8] Burgess v. Mayor of Brockton, 235 Mass. 95, 126 N. E. 456 (1920) (jitney licenses revoked, not for any violation of the law, but solely to prevent a proposed discontinuance of a street railway); Dresser v. City of Wichita, 96 Kan. 820, 153 Pac. 1194 (1915) (an admittedly prohibitive license tax held valid).

[9] 266 U. S. 570, 45 Sup. Ct. 191 (1925).

[10] *Supra* note 9 at 578, 45 Sup. Ct. at 193.

[11] 197 Cal. 230, 240 Pac. 26 (1925).

not transmute a "private" into a "public" carrier, yet, as it could entirely withhold the privilege of using the highway for private gain, it could grant the privilege of such use on whatever terms it chose. Upon appeal the United States Supreme Court took the view that the fact that all commercial traffic is merely privileged in its use of the highway did not enable the legislature to subject a "private" carrier to the same regulations as a "common" one. [12] By its reversal of the decision of the state court, the Supreme Court arrived at the paradoxical conclusion that, while the state might exclude "private" carriers from its roads entirely, it could not allow such vehicles the use of the highway subject to regulative conditions which would, in other fields of private enterprise, constitute a deprivation of property.[13] There would seem to be no practical reason why many regulations imposed on the "public" carrier should not also be imposed on the "private" one.[14] A vehicle employed in the latter manner does just as much damage to paving, and just as effectively tends to delay ordinary travel.[15]

Not only may the distinction between ordinary and commercial highway travel be utilized to sustain more comprehensive regulation of "private" carriers by a state, but it may also serve a municipality in its efforts to regulate "common" carriers engaged in interurban traffic.[16] Of course, this dictinction is of little assistance where the state enactment, conferring upon the city the control of its streets, is construed as expressly limiting

[12] 271 U. S. 583, 46 Sup. Ct. 605 (1926).

[13] *Supra* note 12 at 602, 46 Sup. Ct. at 610; In a characteristically short dissent, Justice Holmes, upholding the regulations in question, says: "The power to exclude altogether generally includes the lesser power to condition."

[14] The Frost and Duke cases hold that a "private" carrier cannot be transmuted into a "common" one, by subjecting it to the same regulations. They do not preclude regulation of a "private" carrier entirely. See David E. Lilienthal and Irwin S. Rosenbaum, *Motor Carrier Regulation by Certificates of Necessity and Convenience* (1926) 36 YALE L. J. 163, 178. Measures regulating "private" carriers have been upheld under a correct interpretation of the Frost case. Savage v. Commonwealth, 152 Va. 992, 147 S. E. 262 (1929). However, an Ohio court has misinterpreted the Duke case, holding that it precluded certification of private carriers. Hissem v. Guran, 112 Ohio St. 59, 146 N. E. 808 (1925).

[15] To distinguish "common" from "private" carriers for regulative purposes is not only a doubtful distinction, but one that is often very hard to draw. See Heuman v. Powers Co., 175 App. Div. 627, 162 N. Y. Supp. 590 (1st Dep't 1916); Weaver v. Public Service Commission, 40 Wyo. 462, 278 Pac. 542 (1929).

[16] Opdyke v. City of Amniston, 16 Ala. App. 436 (1918); Gartside v. East St. Louis, 43 Ill. 47 (1867); Star Transportation Co. v. Mason City, 195 Iowa 930, 192 N. W. 873 (1923); Commonwealth v. Theberge, 231 Mass. 386, 121 N. E. 30 (1918); Cummins v. Jones, 79 Ore. 276, 155 Pac. 171 (1916); Charleston v. Pepper, 1 Rich. 364 (S. C. 1845).

the town to regulation of those commercial vehicles operating entirely within its limits.[17] Where, however, the power of the city over interurban motor-carriers is withheld on the ground that it would constitute a deprivation of property to allow a municipality to tax or otherwise control these vehicles,[18] the distinction may be of considerable utility. The contention that municipal regulation of interurban motor carriers constitutes an unreasonable deprivation of property may be supported if the municipality's power of regulation extends only to motor carriers whose business is "affected with the public interest" of the municipality. But if a city which has been given control of its streets be regarded as controlling interurban commercial traffic not as an industry but as a user for gain of its public roads, it is difficult to see how any regulation of passing commercial vehicles can be called an unreasonable deprivation of property merely because of the interurban character of the business.[19] From a practical point of view, to confer upon a city the duty of caring for its streets, and then to withhold the power to regulate those vehicles which may be the most puzzling elements of its highway problem, would seem to place an unwarranted burden on a municipality.

In a similar manner, the fact that commercial traffic makes the public road its place of business can even be employed to extend the boundaries of state control over "common" carriers. In some instances, failure to recognize this fact has led to the avoidance on constitutional grounds of useful and reasonable legislation aimed at the regulation of "common" carriers.[20] Such statutes have been declared void as constituting an unequal discrimination between the jitney and the pleasure car, as an interference with the contractual rights of the former,[21] as having no basis in matters affecting public welfare,[22] and simply as "not

[17] City of Argenta v. Keath, 130 Ark. 334, 197 S. W. 686 (1917); Ex Parte Smith, 33 Cal. App. 161, 164 Pac. 618 (1917); Commonwealth v Stodder, 2 Cush. 562 (Mass. 1848); Cary v. North Plainfield, 49 N. J. L. 110, 7 Atl. 42 (1886); Morristown-Madison Auto Bus Co. v. Madison, 85 N. J. L. 59, 88 Atl. 829 (1913); White Oak Coal Co. v. Manchester, 109 Va. 749, 64 S. E. 944 (1909).

[18] City of St. Charles v. Nolle, 51 Mo. 122 (1872); Plymouth v. Cooper, 135 N. C. 1, 47 S. E. 129 (1904).

[19] *Cf.* 2 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 718.

[20] Jitney Bus Ass'n of Wilkesbarre v. Wilkesbarre, 256 Pa. 462, 100 Atl. 954 (1917) (provision for continuing liability on an indemnity bond required of jitney operators declared invalid); City of Columbia v. Alexander, 125 S. C. 530, 119 S. E. 241 (1923) (ordinance forbidding cab drivers to operate on a busy street during certain rush hours, declared to be an unequal discrimination between the jitney and the pleasure car).

[21] City of Columbia v. Alexander, *supra* note 20, at 541, 119 S. E. at 244.

[22] Curry v. Osborne, 76 Fla. 39, 42, 79 So. 293, 294 (1918).

justifiable or reasonable." [23] These constitutional restrictions on the regulative power of a state could be relegated to the background if due consideration were given to the fact that, while power to control a business because it is "affected with the public interest" is limited to regulation,[24] the power to control it because it uses the highway for purposes of private gain extends to absolute prohibition.[25] Consequently under this latter theory state motor carrier regulation may reasonably be allowed a much broader scope.

The fact that motor carriers are merely privileged in their use of the road can hardly be used to broaden the power of a state over commercial vehicles moving in interstate commerce. By recent decisions of the United States Supreme Court, practically the whole field of interstate motor traffic has been reserved to the federal government, to the exclusion of the state.[26] Yet, under the doctrine of *Massachusetts v. Mellon*,[27] it may be possible for the national government to participate in the regulation of intrastate commercial traffic by the simple expedient of attaching conditions to the subsidization of state roads, which conditions, when embodied in state legislative enactments would not be subject to constitutional attack if due regard were given to the merely privileged position of commercial traffic on the highway.

The recent expansion in motor transportation bringing with it a necessity for new and more stringent regulation, lends vital significance to this distinction between ordinary travel and business users of the highway. Although the courts will probably not allow the legislatures to ride rough-shod over the motor carrier,[28] a proper recognition of the position of the carrier on

[23] Jitney Bus Ass'n of Wilkesbarre v. Wilkesbarre, *supra* note 20, at 469, 100 Atl. at 955.

[24] TIEDMAN, LIMITATIONS OF POLICE POWER (1886) § 85.

[25] See Peters v. San Antonio, 195 S. W. 989, 990 (Tex. Civ.App. 1917).

[26] Buck v. Kuykendall, 267 U. S. 325, 45 Sup. Ct. 327 (1925); Bush v. Maloy, 267 U. S. 317, 45 Sup. Ct. 326 (1925). Previous to these cases it had been held that, in the absence of federal legislation on the subject a state could regulate motor vehicles moving in interstate commerce. Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. 140 (1915). Reasonable and necessary regulative measures which only incidentally affect interstate commerce are permissible. Liberty Highway Co. v. Michigan Public Utilities Commission, 294 Fed. 703 (E. D. Mich. 1923).

[27] 262 U. S. 447, 43 Sup. Ct. 597 (1923). It was here held that the Supreme Court had no jurisdiction over a suit by a state to enjoin the enforcement of a federal act which was to become operative in the state only on the state's acceptance of it.

[28] It is either expressed or implied in all of the cases which apply the distinction between ordinary and business users of the highway, *supra* note 6, that unfair and arbitrary measures will not be sanctioned. But *cf.* Peters v. San Antonio, *supra* note 25, at 990: "The use of the streets for the prosecution of any private business may be wholly denied, or granted

the highway may well serve to extend the boundaries of the state's power over commercial traffic. Not only would such recognition obviate the necessity of affecting the business of the motor-carrier with the public interest, but it may enable a court to declare in favor of the reasonableness of many a desirable and needed regulative measure which otherwise might be deemed an unreasonable deprivation of property.[29]

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with such provisions as may be deemed proper by the municipality. We fail to understand how the reasonableness of such regulations can be made the basis of an attack."

[29] Thus far, the distinction between ordinary and commercial users of the highway has only been applied by the courts in cases involving motor-carrier regulation. It may be noted, however, that the street railway, just as much as the motor bus, makes the highway its place of business. Indeed, it has been stated that a trolley is not on the street as of right, but merely by privilege. Amesbury v. Citizen's Electric Street Railway Co., 199 Mass. 394, 85 N. E. 419 (1908). The relatively large investment which the street railway represents, and the fact that it operates on tracks, give the trolley a permanent quality which distinguishes it from the bus. Thus a regulative measure which, when applied to a motor carrier would be perfectly legitimate, might amount to a deprivation of property if applied to a street car.